In the Supreme Court
OF THE
United States

OCTOBER TERM 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU,
Appellant,

vs.

WALLACE K. DOWNEY, Insurance Commissioner of the State of California,
Appellee.

On Appeal from the District Court of Appeal of the State of California, First Appellate District.

BRIEF FOR APPELLEE.

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QUESTION PRESENTED.

The law of a state provides that when a driver of a motor vehicle is involved in a traffic accident his license to drive may be suspended without hearing and, if judgment against him results, may be permanently revoked, unless he is covered by automobile

liability insurance up to certain minimum limits at the time of the accident, or thereafter posts assets or a surety bond sufficient to cover a possible judgment within those limits. The law of the same state, as a condition to licensing an insurer to issue insurance covering liabilty for automoble accidents, requires it to insure, up to the same minimum limits, an equitable proportion of those applicants for insurance who are in good faith entitled to such insurance but are unable to procure it through ordinary methods. Is the latter requirement a violation of the due process clause of the Fourteenth Amendment?

If this law is not such a violation as to insurers generally, are the circumstances under which appellant is organized and has heretofore operated such as to make the application of the law to it a taking of its property without due process of law?

SUPPLEMENTATION OF APPELLANT'S "STATEMENT OF THE CASE".

A. Identity and nature of appellant. (Br. of App., pp. 6-8.)

The Court below commented in some detail concerning the nature of appellant as an organization. (R. 172.) However, because of contentions made by appellant (Br. of App., pp. 59-60), we would add the following: The form of business organization, of which appellant is an example, appears to be peculiar to the insurance business. In appellant's case, its members derive, from applicable legislation, the same

immunity to liability that members of a mutual corporation have, i.e., they are immune to any personal liability except for the premium deposit stated in the policy.[1] While technically unincorporated, this form of organization exists solely through legislative permission. While it may be technically a limited partnership, the limitations are such that its members' obligations are no greater than those of any mutual insurance corporation, and are less than those of such corporations where membership imposes a liability to assessment in addition to premium stated in the

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[1]See the extensive note on "Reciprocal or Interinsurance" in 94 A.L.R., pp. 836-855. Legislative regulation prescribing the manner and method of operation of such organizations was sustained by this Court in *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313. California, ever since 1941, has provided that such reciprocals meeting, in effect, stock insurance company financial standards may secure a certificate from the Insurance Commissioner and that holders of policies issued while the certificate is in effect shall be without "assessment" liability, i.e., without liability other than for their premium deposit. (Cal. Ins. Code, Sec. 1401, Appendix C hereof.) The powers of attorney executed by appellant each recite that it is to be exercised in conformity to the rules and regulations of the Insurance Board of the Bureau. (Ex. A, R. 57 and 111-111A; Ex. C, R. 60 and 118-118A, Ex. E, R. 62 and 125-126A; Ex. G, R. 64 and 134-134A.) Such rules, now in effect, have required appellant to secure such a certificate. (Ex. F, rule 6 (c); R. 62 and 130.) Even if such certificate was revoked, each of appellant's members would be liable only for an amount equal and in addition to his premium deposit (R. 131) on policies renewed or *initially issued after revocation.* (Cal. Ins. Code, Sec. 1398, Appendix C.) This is, of course, vastly different from a partnership liability. The difference exists solely by reason of the legislation under which appellant is operating and under which it insists it is entitled to continue to operate. As the Court remarked in the opinion here under attack, the differences of appellant from a mutual insurance corporation are "in mechanics of operation and legal theory, rather than in substance." (R. 172.) The position of its members who are the real parties before the Court if it be no entity, and whom it represents here if it be an entity—does not, in substance, differ from that of members of a mutual insurance corporation. It is a type of mutual insurance company.

policy.[2] Because of the importance of these statutes to appellant's claims, we print the provisions pertinent to these limitations of members' liability in Appendix C to this brief, in supplementation to those printed in Appendix II of the brief for appellant. (For explanation of the application of these sections to appellant's membership, see ftn. 1.)

Likewise, the sense in which the term "cooperative" is used by appellant (Br. of App., pp. 3, 6) should be clearly understood.

The California State Automobile Association, the organizer of appellant, and whose directors constitute appellant's governing board, is not a consumer's cooperative in the popular or legal sense of the term, but a nonprofit membership corporation. It is licensed as a motor club under the California Insurance Code.[3]

Appellant, likewise, is a cooperative *type* of insurer as is, in the same sense, any mutual insurance corpo-

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[2]Cf. Cal. Ins. Code, Sec. 7015 re county mutual fire insurance companies; Sec. 4045 re mutual fire insurance companies.

[3]The pleadings in the trial Court, the findings of the trial judge, and the evidence admitted show that California State Automobile Association is a corporation (R. 2, paragraph "3"; R. 34, second paragraph "III"; R. 43, paragraph "II"); that the membership of its board of directors is, or at the time of the hearing in this case before the California Insurance Department was, identical with that of the governing board of appellant (R. 70-71); that said governing board of appellant is elected by that same board of directors, i.e., elects itself (R. 58; Ex. "B" in R. 59 and 113; Ex. "D" in R. 61 and 119; Ex. "F" R. 62 and 127); and that said association is a "motor club" as defined by the California Insurance Code (R. 2, paragraph "2", R. 43, paragraph "II"; cf. Cal. Ins. Code, Secs. 12142-12311). That code provides for the making of such organizations of contracts to render certain services to motorists in aid of motoring, but its

ration or reciprocal or interinsurance exchange. Such cooperative types of insurers, at the time of enactment of the statute here attacked, were writing over

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insurance services are limited to the selling or giving of an insurance policy in connection with club membership. (Cal. Ins. Code, Sec. 12156.) It cannot itself issue insurance contracts. (Cal. Ins. Code, Sec. 700.)

Since appellee has contended from the beginning—and still does—that the matter of appellant's connection with California State Automobile Association was irrelevant to the question of whether or not appellee was obliged to subscribe to the assigned risk plan, it was successful, at the hearing before the insurance department, in excluding from evidence the proffered articles of incorporation and by-laws of that Association. (R. 69, 70, 101.) The trial Court agreed with this ruling. (R. 5, paragraph commencing "16" and R. 45, Finding "IX.) However, if we disregard these rulings and examine the articles (R. 69, 74, 135, 137), we find that the Association could not today qualify as a "cooperative corporation" under California law, since its purposes (R. 137-138) do not include the matters required by California Corporation Code, Section 12401, fail also to state the matters required by Section 12402 of that code, and that Association has not amended its articles as provided in Section 12206 thereof. No evidence was offered that said Association apportions its earnings to its members as provided by Section 12805 of that code, a characteristic of a co-operative.

It is hardly necessary to state that the Association is not an agricultural marketing association under Chapter 4 of Div. 6 (Secs. 1190-1221) of the California Agricultural Code.

It follows that under California law the Association could not today include the word "cooperative" in its corporate name. (Cal. Corp. Code, Secs. 12950, 12955, 12956.) Ever since 1939, a "cooperative corporation" in California law has had reference to consumer's cooperatives and agricultural marketing cooperatives. (Cal. Corp. Code, Sec. 12201, Cal. Ag. Code, Sec. 1193.)

The said articles and by-laws of California State Automobile Association (R. 137-152) show no sign of any connection with appellant. The connection is entirely governed by appellant's rules and regulations, cited above in this note. These can be amended by two-thirds of appellant's governing board at any regularly called meeting. (R. 125, paragraph "(16)".)

That both the Association and appellant are a cooperative membership type of organization, as distinguished from stock companies doing business solely for the profit of the stockholders, is readily conceded by appellee. But appellant shares this characteristic with all other mutual insurance corporations and reciprocal insurance exchanges who issue a material portion of the automobile liability insurance written in California. (See footnote 4, infra.)

twenty-two per cent of the automobile public liability and property damage insurance written in California.[4]

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[4]See the 79th Annual Report of the California Insurance Commissioner covering the calendar year 1946. It shows the following automobile property damage and public liability insurance premium written in California during that year:

Property damage (p. 276)	$20,714,973.90	
Public liability (p. 284)	48,904,916.30	
Total		$69,619,890.20
Of this appellant wrote:		
Property damage (p. 272)	$ 798,966.84	
Public liability (p. 280)	2,007,291.25	
		$ 2,896,258.09

At that time, then, appellant wrote a fraction over 4% of the entire California automobile public liability and property damage premium.

Again, it should be noted from that same report that *of the $69,619,890.20 total automobile liability and property damage insurance written in this State, over 22+% was written by insurers of the nonprofit mutual type, such as appellant.* The figures are clear:

Property damage by mutuals (p. 269)	$ 11.50	
Property damage by reciprocals (p. 269)	220,196.47	
Property damage by mutuals (p. 272)	1,681,843.21	
Property damage by reciprocals (p. 272):		
California insurers	3,535,438.56	
Other insurers	6,399.92	
Total		$ 5,433,889.66
Public liability by reciprocals (p. 278)	$ 419,339.39	
Public liability by mutuals (p. 280)	4,843,465.05	
Public liability by reciprocals (p. 280):		
California insurers	5,284,465.46	
Other insurers	13,906.22	
Total		$10,561,176.12
Total automobile liability and property damages written by insurers of this type		$16,005,065.78

Of this total of automobile and property damage written by non-

Again, it should be noted that appellant's assertion (Br. of App., p. 7) that "it has never insured a non-member" of the California State Automobile Association is contrary to the trial Court's finding, quoted immediately preceding that assertion, that it insures *corporations or firms in which members are officers or partners.* This distinction has already been forcibly called to its attention by judicial comment. (*Smythe v. Cal. State Auto. Assn.* (9th Cir.), 175 Fed. (2d) 752.) It permits appellant to insure many commercially used automobiles.

B. The statutes involved, and the history and background thereof.

As pointed out by the Court below (R. 173-176), not one but several statutes are involved in a single plan or scheme for the protection of persons involved in highway accidents. These statutes deal with the problem from two aspects: (1) Requiring the driver to procure insurance or to post cash or a surety bond; and (2) requiring insurers to participate in a plan for making liability insurance, in a modest minimum limit, available to drivers. It is the second aspect of the statutes that is attacked in this proceeding. Its ultimate justification, however, may be the existence of the first aspect.

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profit mutual type insurers appellant wrote $2,806,258.09 (see above, this note) or over 17 per cent.

Under the voluntary plan risks were assigned to the member insurers in proportion to automobile property damage and bodily injury insurance writing of each member during the previous year. (Sec. 83, R. 163-164.) Under the compulsory plan here under attack, the bodily injury only is used as a basis. (Sec. 2445, R. 21.)

(1) Security by the driver: At the beginning of the California legislative session of 1947, there were three of these statutes in effect:

(a) In 1929 there had been enacted a statute, known as the "Financial Responsibility Law," providing that upon non-payment of a judgment for personal injury or certain property damage arising out of operation of a motor vehicle, the driver's license should be suspended not to be reinstated until the judgment is paid and either liability insurance, a surety bond or cash is furnished to cover future driving. In the same year legislation also imposed liability with the same corresponding penalty on the owner of the vehicle when driven with his consent. (Cal. Stats. 1929, ch. 258, sec. 4.) These statutes were eventually codified as sections 402 and 410-418, California Vehicle Code, and are printed, as in effect when this action was brought, in Appendix A hereto.

(b) In 1935, sections 5 to 7 of the "Highway Carriers Act" and sections 4 to 6 of the "City Carriers Act" were adopted to require a highway truck operator to secure liability insurance, cash, or a bond, in certain minimum limits as a prerequisite to a license for commercial carriage of goods by motor truck. (Cal. Stats. 1935, ch. 312, p. 1057; Deering's California General Laws, Act 5134; Cal. Stats. 1935, ch. 223, p. 878, Deering's Calif. General La , Act 5129a.) These sections are also printed in Appendix A hereto.

Between 1929 and 1942, therefore, a for hire or public carrier truck operator either procured insur-

ance or posted cash or bond, before he could operate. Any other driver operated without insurance or bond at peril of losing his driver's license in the event of an accident resulting in a judgment against him. (Cal. Veh. Code, sec. 410.) If such a judgment was issued and he paid it up to the amount required, he could not keep or secure a license to drive without first securing the insurance policy or bond, or posting the required amount in cash. It is true that these laws could not be described as compulsory insurance so far as the ordinary driver was concerned. He could register his automobile and procure his license without insurance—but at peril of losing his license if he failed to pay a judgment and if he paid it, then the insurance became compulsory for the future. In short, the uninsured driver without considerable financial resources staked his right to drive upon his luck in keeping free of such a judgment. It is common knowledge that insurance company underwriters are by nature cautious people, not given to taking chances, and, inasmuch as the average annual automobile liability insurance premium runs under a hundred dollars, the underwriter declines a risk with the slightest tinge of what, to him, constitutes undesirability, without wasting money investigating the actual hazard in the particular case. As a result, one such accident would make such insurance difficult to procure.

Consequently, in 1942, by united action of all the automobile liability insurance companies licensed in California, there was organized a voluntary assigned risk plan, with the blessing of the California Insur-

ance Commissioner. (R. 152.)[5] To this plan appellant was a subscriber and, consequently, issued insurance to the applicants assigned to it.[6]

This voluntary plan was limited to assignment of risks required to obtain insurance in order to drive or operate. (R. 152-153, sec. 1 of plan.)[7] Appellant has attacked the "standard" for acceptance of risks into the compulsory plan (R. 194-200) and even does so before this Court. (Br. of App., pp. 70-72.) Hence,

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[5]75th Ann. Rep. of the California Insurance Commissioner, p. lxxviii.

[6]The method by which appellant maintained its standard of requiring all its insureds to be members of the California State Automobile Association while at the same time participating in the first assigned risks plan is shown by the testimony of E. B. De Golia, Director of that Association and member of appellant's governing board:

"Q. And you also know, do you not, that there were risks accepted under the voluntary assigned risk plan by the California State Inter-Insurance Bureau which were not members of the California State Automobile Association?

A. The risks were taken and the applicant was then required to join the Association.

Q. But the risks were taken first?

A. I do not know that procedure; I do not know how that follows; but I do know the Committee was instructed then to see that the person applying for membership in the Bureau should join the Association.

Q. And it is your testimony then that every member who received insurance through the Assigned Risk Plan with you during the period when the Inter-Insurance Bureau was a participant therein did join the Association?

A. So far as I know, yes, sir." (R. 77.)

[7]While the trial Court found that the hearing officer did not err in rejecting the offer of the voluntary plan in evidence (Finding "IX", R. 45, referring to paragraph "16", R. 5, of Appellant's Petition for Writ of Mandate) and the District Court of Appeal affirmed (R. 203), the latter Court did discuss the voluntary plan to the extent of noting the limited class of persons covered. (R. 174-175.) To that extent it must be regarded as impliedly modifying the finding as to respondent's (appellant's) Exhibit J and treating the same as in evidence, despite the initial rejection (R. 87) at the departmental hearing.

it is interesting to note that the standard set up by the insurers, including appellant (Br. of App., p. 10), in a contract under which they agreed—without compulsion of law—to take risks assigned them (sec. 43, R. 160-161; sec. 70; R. 162-163), was "risks that *in good faith are entitled to insurance*". (R. 156, sec. 22; R. 152, sec. 1; emph. sup.) In 1943, the California legislature made special provisions for registration of the plan and clarified certain technical aspects. (Cal. Ins. Code, secs. 1110-1113.)

The voluntary plan, limited to the driver who was required to procure insurance in order to get a license, did nothing for the driver who had not been in trouble but nevertheless could not get insurance because he was a member of a class or group of persons whom conservative underwriters would not accept because, as a class, they felt the risk was greater than normal. The California District Court of Appeal referred to "members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers". (R. 174.)

This was the situation at the commencement of 1947, when appellant withdrew from the voluntary plan. (R. 77, 106.)

(2) Requirement of insurers' participation: At that 1947 session, the legislature enacted an emergency compulsory assigned risk law with the urgency clause partially quoted in appellant's brief (Br. of App., p. 9), and which recites, in effect, that appel-

lant's withdrawal from the voluntary plan created the urgency by breaking up the voluntary plan. There is no question that the urgency was felt to be pressing, since the bill was introduced January 22 (California Assembly Journal, 1947, p. 647)[7] and finally passed by the Houses February 5 (A.J., 1947, p. 1398).

Meanwhile an attempted amendment of the bill to exclude appellant from its operation had been beaten in the State Senate.[8]

This bill enacted Chapter 39 of the California Statutes of 1947, and comprised most of the matter which subsequently appeared in sections 11620 and 11627, California Insurance Code, as quoted in Ap-

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[7]The Court can notice facts appearing from the Journal of the Assembly, since a California Court has judicial notice of these journals and the legislative history of statutes. (*French v. Senate*, 146 Cal. 604, 80 Pac. 1031; *Oakland Paving Co. v. Hilton*, 69 Cal. 479, 11 Pac. 3; *People v. Sterling Refining Co.*, 86 Cal. App. 558, 261 Pac. 1080; *People v. Pagni*, 69 Cal. App. 94, 230 Pac. 1001.)

[8]The fact that the legislature considered and rejected exemption of appellant from the plan is emphasized by the action of the State Senate on a proposed amendment to that bill on January 31, 1947:

"Senator Carter moved the adoption of the following amendment:

Amendment No. 1

On page 1, line 19 of the printed bill • • • insert

'As used in this article, the designation "insurers admitted to transact liability insurance" shall not include an insurer whose transactions are controlled by a power of attorney from its subscribers which restricts its subscribers to the members of a limited, specified group of automobile owners and operators; provided a certified copy of such power of attorney is on file with the commissioner.'

Senator Cunningham moved that the amendment offered by Senator Carter to Assembly Bill No. 611 be laid on the table. • • • • • • •

The roll was called, and the motion carried by the following vote: • • •" (Senate Journal, 1947, p. 665.)

pendix 1 to Brief of Appellant herein. This was the prompt action by the legislature referred to in the Court's opinion. (R. 175.)

However, two other developments had occurred: On January 14, a week before the introduction of Assembly Bill 611, the author of Assembly Bill 611 had introduced Assembly Bill 291, almost identical in substance with No. 611. (Assem. Journal, 1947, p. 367.) Only two weeks later, on January 31, he was a co-author of Assembly Bill 1819, which proposed drastically to increase the severity of the Financial Responsibility Law by providing for suspension, without a hearing, of an uninsured driver who was involved in a traffic accident.[10] (Assem. Journal, 1947, p. 996.)

Assembly Bill 291, the compulsory assigned risk law here under attack, and which was itself made amendatory of the urgency bill above referred to, and Assembly Bill 1819, the amendment to the Financial Responsibility Law, were introduced but seventeen days apart, had a common author, were both presented to the Governor on June 20 (Assem. Journal, 1947, pp. 5258, 5259) and were both signed by him on July 8. It is true that while both bills were undergoing the legislative process, the urgency bill was introduced and enacted, but we do not believe, in view of this history, that it can be questioned that the

[10]This was the bill which as finally passed enacted Sections 420 et seq., Cal. Veh. Code, printed in Appendix A. It should be noted that there is here no contention as to the constitutionality of this statute. (*Escobedo v. State of California*, 35 Cal. (2d) 870, 222 Pac. (2d) 1; cf. *Ex parte Poresky*, 290 U.S. 30.)

compulsory assigned risk law must be interpreted in the light of the amendments to the Financial Responsibility Law enacted at the same session, or can it be said that there is anything "anachronistic" (Br. of App., p. 66 ftn.) in appellee's claim that each was enacted in contemplation of the other, in view of this legislative history.

Attention should also be directed to the fact that California has in effect made the injured party a direct beneficiary in all public liability policies by providing for direct proceedings against the insurer on a judgment against an insured tort-feasor. (Cal. Ins. Code, secs. 11580-11581, printed in Appendix D hereto.)

C. Character of the risks assigned under the law.

Appellant's brief (Br. of App., p. 14) does not give a fair picture of the risks eligible to assignment under the plan. As we mentioned above "members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers" (R. 174) are eligible.

The urgency clause relied on by appellant (Br. of App., p. 9) is taken from the urgency bill hurriedly adopted during February of 1947, as mentioned above, for the purpose of saving a break-up of the voluntary plan. It dealt with the worst class of those eligible to the present plan, those whose license had been suspended under section 410, Vehicle Code (see Appendix A hereto), i.e., who had had a judgment suffered

against them for personal injury, or for property damage exceeding $100 arising out of a traffic accident.

These risks were characteristic of the voluntary plan, which was limited to those required to obtain insurance in order to be licensed. (R. 152-153, 174-175.) The compulsory plan contains extensive exclusionary provisions to winnow out the really uninsurable (R. 15-19), such as narcotic users, drunkards, habitual traffic law violators, defective cars, persons with major physical handicaps, transporters of gasoline and explosives, etc.[11] Appellant itself brought out the fact that the average number of applications *under the voluntary plan* was 230 a month, but during the first month and ten days of operation *under the plan here under attack,* over 800 applications were received and the manager expected about 1,000 a month thereafter. (R. 92.) In short, about three-fourths of the applicants under the present plan would not have been eligible under the voluntary plan because they were not subject to section 410, Vehicle Code, i.e., were not *required* to procure insurance in order to drive. It is notorious, for instance, that un-

[11] Cf., R. 14-19, and particularly Section 2451.8 of the plan, reading as follows:

"2431.8. An applicant is not in good faith entitled to insurance if, upon the basis of investigation by the insurer to which the risk is assigned, it is determined to the satisfaction of the Committee that the accident record, conviction record (criminal and traffic), age, and physical, mental (fol. 29), or other condition of the applicant or anyone who normally or usually drives the automobile, considered as a whole, are such that his operation of an automobile would endanger public safety."

derwriters dislike to issue liability insurance to members of minority groups for fear of jury prejudice if they become defendants in liability suits. Similar situations can easily be visualized in cases of minor physical handicaps. (See rules 2431.55 (R. 16-17) and 2432-2437 (R. 18-19.) Thus the great majority of risks under the compulsory plan are not of the class described in the urgency clause upon which appellant relies.[12]

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[12]In view of appellant's persistent contention that great loss will be suffered by it from acceptance of these assigned risks, attention should also be directed to the facts available. One of these is the plan permits premium charges considerably higher than those against the usual driver (but see below). The rule permits the application of the "rules, rates, minimum premiums, rating plans and classifications which the insurer • • • normally applies • • • to risks not subject to the plan. (R. 25, Rule 2460.) As pointed out by departmental counsel at the hearing, these might include such added charges as 5% additional to the regular rate because of minority of a driver or 50% additional because of a conviction of drunkenness. (R. 89-91.) To this "manual" premium (i.e., compiled by computation from the rules, classifications, and rates set forth in the insurer's manual for determining premium or rate), the plan permitted an additional charge of "10% for long haul trucking risks and 15% for all other risks" (R. 25, Rule 2460.) Furthermore, in case of the unusual situation where the manual in use by the insurer does not call for surcharges to meet particular hazards, such as minority, or where these surcharges are insufficient because of some hazard not barred by the exclusionary rules (R. 14-19), the insurer can make proper charges with the approval of the governing Committee of the plan (R. 25, Rule 2461), subject, of course, to appeal to the Commissioner (R. 30-31, Rule 2495) from a refusal of approval.

Experience, however, has shown that part of the surcharge was unnecessary and, *upon petition of the insurers involved*, has been eliminated.

This Court may take judicial notice of official actions which directly affect the matter in issue. (*Gibbes v. Zimmerman*, 290 U.S. 326; *Cal. Code Civ. Proc.*, Sec. 1875(3); *O'Neal v. Seabury*, 24 Cal. App. (2d) 308, 74 Pac. (2d) 1082.) It may thus take notice of an order of the California Insurance Commissioner, dated January 5, 1951, which amended Section 2460 of the plan (R. 25) to eliminate the special surcharge added to the insured's pre-

SUMMARY OF ARGUMENT.

I. The statute and plan here under attack conform to this Court's prescription of standards for determining constitutionality of State police power legislation. A number of States have enacted similar statutes. With one exception, whenever these statutes have been passed on by State Courts they have been sustained. The exception was unsound in its law as to the basic point here involved, was also based on a ground not here involved. This Court has long held that police power statutes having a proper purpose and object in the interest of the public welfare will be held constitutional if the law is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the object sought to be attacked. A long line of cases, which involved legislation requiring acceptance or prompt rejection of hail insurance applications, regulated or took over the business of workmen's compensation insurance, imposed public service obligations upon grain elevator operators, provided for regulation of fire insurance rates, and many regulations of various practices in the insurance business, have shown that regulation

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mium for the privilege of assignment in certain of those cases and of the notice on which it was based. As the plan started operation in January, 1948 (R. 92), this order would be based on over two years' experience under the compulsory plan. The notice and order are printed as Appendix B hereto. It should be presumed that such order was supported by evidence justifying it. (*Cal. Code Civ. Proc.*, Sec. 1963(15); *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. (2d) 330, 129 Pac. (2d) 159; *Pacific States Co. v. White*, 296 U.S. 176.) Under these circumstances a speculation that the assigned risks experience will cause such loss as to be confiscatory of appellant's property is untenable.

analogous to the legislation here under attack is constitutional. These cases have established also that this Court makes no distinction as to constitutionality between legislation which compels the making of a contract and legislation which merely prohibits a particular practice. It also establishes the principle that voluntary dedication of business or property to public service is not essential to the constitutionality of legislation imposing obligations of service upon that business or property.

II. The legislation here under attack does not impose upon appellant or upon any other insurer any obligation to serve the general public. The legislation itself and the plan promulgated pursuant to it are both carefully drawn to provide that a member of the public cannot make any demand of service upon any particular insurer, that the obligation of such service is equitably proportioned to the volume of business done in the State in the particular field of insurance by each insurer, that the uninsurable risks be excluded, and that the premiums charged be adequate.

III. No question of the taking of property for public use without compensation is presented here. The appellant offered no evidence which would make even a *prima facie* showing of confiscation, and no issue on that point arises here.

IV. Appellant's conduct of the insurance business and its method and form of organization exist only by virtue of legislation. Its members are exercising the privilege of limiting their liability on the obliga-

tions of appellant to the same extent as members of mutual corporations, and the transaction of the insurance business by appellant is itself a privilege conferred and not a natural right of its members.

V. The doctrine of "unconstitutional conditions" is not here involved because the conditions themselves imposed by the legislation upon the privilege of transacting automobile liability insurance are not unconstitutional but are reasonable and appropriate to the achievement of a proper object in the interests of the public welfare.

VI. With respect to a number of facts urged and a number of the cases cited by appellant, while the holdings of the cases and the points of law stated are not necessarily incorrect, factors involved in this problem, such as presence of State legislation not considered in the cases, or the existence of subsequent cases modifying the original statements of law in the cases cited, are not set forth by appellant.

I. THE STATUTE AND PLAN HERE UNDER ATTACK CONFORM TO THE STANDARDS LONG PRESCRIBED BY THIS COURT AS MEASURES OF THE CONSTITUTIONALITY OF STATE POLICE POWER LEGISLATION.

A. DECISIONS OF THIS COURT SUSTAIN A BROAD REGULATORY POWER OF THE STATES OVER THE INSURANCE BUSINESS.

We start with the basic concept that "Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long

been withdrawn from the benefits and caprices of free competition." *Osborn v. Ozlin,* 310 U.S. 53, 65. The cases in this Court have uniformly sustained regulatory laws covering in detail most of the operations of insurance companies.[13] It is probably true, however, that no case has come before this or any Federal Court which dealt with the validity of a statute by the terms of which an insurance company is required, as a condition to being licensed, to insure persons or risks not originally selected or accepted by it. Below, we discuss the case of *National Union Fire Ins. Co. v. Wanberg,* 260 U.S. 71. It is the closest, of the Federal Court cases, to the situation here involved, but this Court there pointed out that there was no actual compulsion—only timely rejection of applications for insurance was required.

In this case, the legislature of a State has found it necessary to require "a reasonable plan for the equitable apportionment among * * * insurers of applicants for automobile * * * insurance who are in good

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[13]In *Osborn v. Ozlin,* supra, the learned justice cited *German Alliance Ins. Co. v. Lewis,* 233 U.S. 389, and *Aetna Ins. Co. v. Hyde,* 275 U.S. 440, on insurance rate regulation; *O'Gorman and Young v. Hartford Fire Ins. Co.,* 282 U.S. 251, on regulation of agents' commissions; *National Union Fire Ins. Co. v. Wanberg,* 260 U.S. 71, on regulation of making of hail insurance contracts, and *La Tourette v. McMaster,* 248 U.S. 465, on regulation of licensing of insurance brokers. Many others may be instanced: *Hardware Dealers' Mut. F. Ins. Co. v. Glidden Co.,* 284 U.S. 151, on regulation of fire insurance policy provisions; *Neblett v. Carpenter,* 305 U.S. 297, on state control of liquidation and rehabilitation; *Orient Ins. Co. v. Daggs,* 172 U.S. 557, on the "valued policy" law; *Whitfield v. Aetna Life Ins. Co.,* 205 U.S. 489, on anti-suicide clauses in life insurance policies; *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, on regulation of reciprocal exchanges as to finances and membership, etc.

faith entitled to but are unable to procure such insurance through ordinary methods". It is evident that the legislature believed such a plan reasonable and necessary, that risks "in good faith entitled to" automobile liability insurance should be apportioned among and insured by insurers who made a business of writing that kind of insurance.

Other States, also, have enacted statutes embodying similar assigned risk plans.[14] In *Osborn v. Ozlin*, supra, this Court said:

> "When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts." (310 U.S. 53, 64-65.)

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[14]Automobile liability insurance: New York Ins. Law Sec. 63, N.Y. Laws 1946, ch. 467; Ill. Rev. Stats. 1946, ch. 95½, Sec. 58m, Ill. Laws 1945, p. 1043.

Workmen's compensation insurance: Mason's Minn. Stats. Sec. 3664-1, Minn. Session Laws 1937, ch. 175, p. 241; Wis. Stats. 1943, Sec. 205.30; 1944 Supp. to Va. Code, Secs. 2154a92, 2154a93, Va. Laws 1944, ch. 384, Secs. 92, 93.

Massachusetts' compulsory automobile insurance law and the Texas compulsory workmen's compensation insurance law which have been sustained in State Court decisions are discussed in the text, supra. It will be seen that both are more drastic curbs on "freedom of contract" than the later developed assigned risk plans.

B. NOT ONLY HAVE STATES ADOPTED LEGISLATION EMBODYING COMPULSIONS UPON INSURANCE COMPANIES IDENTICAL WITH OR MORE DRASTIC THAN THE LEGISLATION HERE INVOLVED BUT THE HIGHEST COURTS OF SEVERAL STATES HAVE ENTERTAINED LITIGATION TO ENFORCE THESE COMPULSIONS.

We have already referred to similar state laws.[15]

Perhaps the best reasoned and most pertinent discussion of that nice adjustment of the liberties and rights involved under such a law, an adjustment which is the essence of all decisions on the constitutionality of such exercises of the police power, is found in a Massachusetts advisory opinion, *In re Opinion of the Justices,* 251 Mass. 569, 147 N.E. 681.

The occasion of that opinion was a request by the Massachusetts Legislature for an opinion as to the constitutionality of proposed legislation which would require of automobile owners security against liability for traffic injury or fatality by a deposit of cash, a surety bond or an automobile liability insurance policy as a condition precedent to registration of an automobile to go upon the highways of Massachusetts, but on the other hand would also require companies engaged in the business of automobile liability insurance in Massachusetts to accept applicants for such insurance, and providing for determination by a State administrative board as to the reasonableness of any rejection of an applicant or of a cancellation of a policy by such companies. A determination by that board that the rejection or cancellation was unreasonable, re-

[15]Footnote 14, supra.

quired acceptance of the application, or reinstatement of the policy, by the company.

The Justices advised that:

"* * * The question whether a particular risk shall be assumed by an insurer or surety is an important factor in the conduct of such business. Health, age, and susceptibility to disease form the basis of acceptance or rejection of most applicants for life insurance. Character, physical capacity, sight, hearing, financial responsibility, record of past conduct, personal habits, nature and extent of business and general reputation are among the elements of essential significance in determining whether motor vehicle liability bonding or insurance for any particular applicant shall be undertaken. To subject the determination of such a vital question by an insurer or surety to review is a great interference with freedom of contract. The right to freedom of contract is secured as a general rule by the constitutions of commonwealth and nation; but there are exceptions where legislative interference with that right is permissible. We are of opinion that the proposed bill in this aspect does not transcend legislative power. The right of the citizen to register a motor vehicle whereby he may travel upon the ways is made strictly conditional upon his depositing cash or securities or upon procuring a motor vehicle liability policy or bond. This, too, is a great interference with freedom of action. The refusal by corporations to issue such policy or sign such bond may drive one out of business or seriously impair his convenience. Where such paramount interests are at stake with sole reference to the use of

> public ways provided wholly at the expense of the government, there is constitutional basis for legislative regulation to the end that no injustice may be done. Unwarranted discrimination may arise against certain applicants. Instances may arise of honest difference of opinion whether a policy or bond ought to be issued at all, or whether, after issuance, it ought to be canceled. To provide an impartial administrative tribunal to settle such controversies, although going to the verge of power, cannot in our opinion be pronounced in excess of the authority conferred by the Constitution upon the General Court. * * *." (251 Mass. 569, 147 N.E. 681, 701.)

It is true that the Justices grounded their advice as to the right of the State to require insurers to comply with such a statute upon the reserved power of the State to alter domestic corporate charters and to compel foreign corporations to do business on the same terms as domestic ones. Appellant is not a corporation, but as we demonstrate in this brief, its organization and method of doing business is not less subject to legislative requirements.[16]

While *In re Opinion of the Justices,* supra, was an advisory opinion, the bill which was the subject of the Justices' advice was enacted,[17] and the force of the

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[16]See "A. Identity and Nature of Appellant" at the beginning of the "Supplementation of Appellant's Statement of the Case" and footnotes 1 and 3, supra, also "IV. Appellant's Conduct of Insurance Business, and Its Methods and Form of Organization, Are Not Less Privileges Granted by the State, Nor Less Subject to Regulation, Than That of Any Other Insurer", infra.

[17]Mass. Gen. Laws, ch. 175, Secs. 113A-113D.

opinion, as stating the law of Massachusetts, has been shown by frequent citation of the case by the Supreme Judicial Court of that State.[18]

Cases before that Court have litigated the provisions of that Act, in every case sustaining it.

Liberty Mutual Ins. Co. v. Acting Comm'r. of Ins., 265 Mass. 23, 163 N.E. 648;[19]

Brest v. Commissioner of Insurance, 270 Mass. 7, 169 N.E. 657;

Gulesian v. Senibaldi, 289 Mass. 384, 194 N.E. 119;

Schlabach v. Commissioner, 290 Mass. 585, 195 N.E. 887;

Merchants Mut. Casualty Co. v. Justices, 291 Mass. 164, 197 N.E. 166;

Factory Mut. Liability Ins. Co. v. Justices, etc., 300 Mass. 513, 16 N.E. (2d) 38;[19]

American Employers' Ins. Co. v. Commissioner, etc., 298 Mass. 161, 10 N.E. (2d) 76;[19]

Neustadt v. Employers, etc., Corpn., 303 Mass. 321, 21 N.E. (2d) 538.[19]

In *Factory Mutual Liability Co. v. Justices*, supra, the insurance company again raised the question of

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[18]This opinion was cited as supporting many and diverse propositions of law in a great number of contested cases in Massachusetts commencing with *Barrows v. Farnam's Stage Lines*, 150 N.E. 206, 208, 254 Mass. 240; *Boston & A.R. Co. v. New York Cent. R. Co.*, 153 N.E. 19, 25, 256 Mass. 600; and running through to the latest we have found, *Boston and Provinceton S.S. Line v. Selectmen*, 84 N.E. (2d) 121, 122, 323 Mass. 686; *Lowell Gas Co. v. Dept. of Public Utilities*, 84 N.E. (2d) 811, 816, 329 Mass. 80; and *Collins v. Selectmen*, 91 N.E. (2d) 747, 749, Mass. ——.

[19]Case cites *In re Opinion of Justices*, supra.

constitutionality of the law imposing the compulsion to insure persons who desired such insurance. In that case the applicant for insurance, in accordance with the statute, had taken the company's refusal to insure him before the proper State board, which had ordered the insurance to be issued. Under the provisions of the statute the company "appealed" the board's decision to the Superior Court and that decision was affirmed. On certiorari, before the Supreme Judicial Court, the question of constitutionality was briefly dealt with on the basis that the corporation, having been licensed in Massachusetts, took its license subject to the conditions thereof. But the Court in its reference to the conditions, cited in *In re Opinion of the Justices* on its fundamental tenet that a company accepting a motor vehicle liability insurance license could not be heard to complain of the condition involved (16 N.E. (2d) 38, 39).

> "When our Legislature enacted the compulsory motor vehicle insurance law, by which all persons registering motor vehicles are required to provide security for the payment of claims for damages arising from their operation on the public ways, it foresaw the necessity for providing at the same time a procedure under which individuals could compel companies engaging in the business to insure them in the absence of sound reasons for refusal. One of the conditions accepted by a company which enters this field is that it must surrender its own final judgment as to whether or not it will issue a policy and must submit that matter to the determination of the board and of the court on appeal." (300 Mass. 513, 16 N.E. (2d) 38, 40.)

In the case now before this Court, appellee contends that the privilege of doing an automobile liability insurance business as an interinsurance exchange, with the limitations of membership liability and other privileges granted under that form of organization, and with the public stake in the lives and health of the persons and use of the highways covered by that insurance, may be conditioned upon the insurer surrendering its power of final determination as to whether it will issue insurance. This, particularly, applies in a relatively small number of cases where it is determined, under rules prescribed under legislative authority by an impartial public official with its final determination to be made by the official himself, that no sound reason exists for denying the coverage.

Texas courts, likewise, met a similar problem in connection with workmen's compensation insurance. Under the Texas Workmen's Compensation Act, the Texas Employers Insurance Association was constituted. It was made a public corporation to issue this type of insurance. (*Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556, 562; *Texas Rev. Stat.* 1925, arts. 8308, 8309.) Private companies, however, could also write the insurance. The construction that both the fund and the private companies who write Workmen's Compensation insurance must accept all applicants was set forth in the following cases:

Southern Casualty Co. v. Freeman (Tex. Civ. App.), 13 S.W. (2d) 148, 150;

Texas Employers' Ins. Association v. U. S. Torpedo Co. (Tex. Com. App.), 26 S.W. (2d) 1057;

Harris v. Traders' & Gen. Ins. Co. (Tex. Civ. App.), 82 S.W. (2d) 750;[20]

Federal Underwriters' Exch. v. Walker (Tex. Civ. App.), 134 S.W. (2d) 388.

In *Texas Employers' Ins. Association v. United States Torpedo Co.*, supra, the torpedo company had procured the issuance by the District Court of a writ of mandamus to the Insurance Association to compel the latter to issue its policy of workmen's compensation insurance to the torpedo company, covering employees of the torpedo company. The judgment of the District Court was affirmed by the Court of Civil Appeals and on a writ of error came before the Texas Commission of Appeals for recommendation to the Supreme Court. In its opinion holding that the Texas Employers' Insurance Association was bound to accept all risks coming within the terms of the workmen's compensation law, the Commission said:

> "But it is said, if the Compensation Act be so construed that the Texas Employers' Insurance Association is required to accept all risks coming under its terms, the practical result would be that it would be forced to carry all extra hazardous risks, and private insurance companies would only accept less hazardous ones, while at the same time they would be permitted to charge the same rates of premiums as charged by the association, and thus a legislative advantage would be given such companies.
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> "We are unwilling to give assent to the assumption that a private insurance company has the

[20] "Texas writ of error dismissed": Shepard's "Southwestern Citations", vol. 1, 1950, p. 3004.

privilege under the terms of the act to select the risks which it will cover by its policies. While it is true the Legislature has no power to require private insurance companies to issue policies of insurance to employers under the Workmen's Compensation Act, yet we have no doubt of its authority to require such companies, who may desire to avail themselves of the privilege of writing such policies, to comply with the terms of the act and give protection to all who are entitled to be covered by policies of insurance. We think a fair construction of this act requires any insurance company desiring to avail itself of the privilege of writing policies in accordance with its terms to stand on the same footing as the agency specially designed to carry out the objects and purposes of the act.

"Naturally we should assume that the Legislature did not intend by the passage of this law to so legislate as to give private insurance companies an undue or unfair advantage over the very agency it created for the purpose of carrying out the provisions of the compensation law. It will be noted that private insurance companies are required to charge and collect premiums on policies issued by them under this law in a sum not less than those charged by the association. If it had been the intention of the lawmaking body that the association was compelled to accept extra hazardous risks, and private companies were not required to do so, evidently it would not have prohibited such companies from writing the policies issued by them at a lower premium rate than that charged by the association." (26 S.W. (2d) 1057, 1058-1059.)

The Commission therefore recommended that the decision be affirmed and the Texas Supreme Court affirmed accordingly. (26 S.W. (2d) 1057, 1059.) In our brief before the California Court, we took the view that the above discussion was dictum since what the Court did was affirm a judgment requiring issuance of the writ to the insurance association and not to a company, no company being party to the suit. However, on more mature reading, we submit that this discussion was necessary to the decision, and became Texas law.

Apparently this was the construction put on the opinion by the Texas Court of Civil Appeals in *Harris v. Traders' & General Insurance Company,* supra. In that case the complaint for damages against the insurance company alleged that Harris had been employed by a highway contractor, that the insurance company had a rule that it would request any employer, whose workmen's compensation it covered, to discharge employees who had previously drawn workmen's compensation insurance benefits, that pursuant to the rule it had procured the discharge of Harris and prayed damages against the insurance company for wrongfully procuring the discharge of Harris. From dismissal of the action on demurrer sustained, plaintiff appealed to the Court of Civil Appeals. That Court cited the opinion in the *Texas Employers' Insurance Association* case, supra, that a workmen's compensation insurer was without power to refuse an application for insurance, and said:

"Since a compensation insurance carrier is compelled by law to assume the risk upon proper request of a qualified employer, the duty is absolute, and it cannot limit that duty by promulgating any sort of a rule which, in its operation, would limit the discretion of the employer in the selection of its employees or which would disqualify a laborer seeking employment, who, but for the rule, would be qualified to accept and to retain employment. * * *" (82 S.W. (2d) 750, 751.)

Consequently, the Court held that the petition stated a cause of action for procuring plaintiff's discharge by a violation of the workmen's compensation insurance law, and reversed the trial Court.

Subsequently, in *Federal Underwriter's Exchange v. Walker,* supra, the principle that compensation insurance carrier had to accept qualified risks was cited in support of the Court's reasoning. (134 S.W. (2d) 388, 393.)

It is interesting that the Texas Supreme Court in the *Texas Employers' Insurance Association* case stated that it was influenced in interpreting the Texas statute by the fact that it would not presume that the legislature would discriminate in *favor* of insurance companies *against* the State Fund. (26 S.W. (2d) 1057, 1058-1059, quoted supra.) For the Arizona Supreme Court subsequently passed on legislation which discriminated in *favor* of the *State Fund* and *against* the *insurance companies* and held the statute to be unconstitutional in *Employers' Liability Assurance*

Corporation, v. Frost, 48 Ariz. 402, 62 Pac. (2d) 320, the only case which appellant or appellee have found which held unconstitutional a statute which required insurance companies to accept applications for insurance.

This last case, however, contains a number of elements which make it a very weak support for any theory under which the California legislation here under attack may be held invalid. One of these is the fact that the Court obviously failed to note the status of the principle involved as reflected in the decisions of Courts of other States. The other is the element of unfair discrimination between insurers, first mentioned by the Texas Supreme Court, supra.

In this *Frost* case the insurance company sought to have annulled a workmen's compensation award arising out of the death of a workman. The employer had filed his written application with and paid the initial premium to the soliciting agent for the company, in response to a letter from the general agent of the company stating that upon receipt thereof "we shall be glad to give this risk our further consideration". (48 Ariz. 402, 62 Pac. (2d) 320, 321.) On the same day the soliciting agent mailed the premium and application to the general agent and on that day, also, the workman was killed. The Arizona statute provided that an employer must secure compensation either by insurance in the Arizona State Fund or by securing from the Commission consent to self-insure, or:

> "By insuring * * * with a corporation * * * authorized to transact * * * workmen's compensa-

tion insurance in the state * * *. *Such corporation * * * shall write and carry all risks or insurance for which application may be made to it which are not prohibited by law,* and shall carry all risks to the conclusion of the policy period unless cancellation is agreed to by the commission and the employer * * *." (48 Ariz. 402, 62 Pac. (2d) 320, 322.)

Apparently on the theory that the insurer had no option to refuse the application and that therefore the coverage was effective when the application was filed with and the premium paid the soliciting agent, the Industrial Commission made an award of compensation to the deceased workman's parents. The Supreme Court of Arizona annulled the award on the ground that the statute requiring it to accept the application violated the "freedom of contract clause of the Fourteenth Amendment."

Careful examination of the grounds given by the Court in its opinion, however, show that it is of slight value as authority here.

For instance, the Court prefaces its discussion of the authorities with the statement that:

> "The courts have gone far in upholding the right of the state to regulate and control insurance business within its boundaries, but we have found no case where the facts, as here, call for a decision upon the power of the Legislature to make it mandatory upon an insurance company qualifying under its laws to carry a certain kind of insurance to insure all risks of that kind 'for which application may be made to it which are not

prohibited by law.'" (48 Ariz. 402, 62 Pac. (2d) 320, 324.)

This *Frost* opinion is dated November 23, 1936. Of the Texas and Massachusetts cases above cited, the *Texas Employers' Insurance Association* case had been decided in 1930, and the *Harris* case had been decided on May 10, 1935, *In re Opinion of the Justices* had issued in 1925, the *Liberty Mutual Insurance Company* case in 1928, and the *Brest* case in 1930, the latter two both citing *opinion of the Justices* as law. While appellant has attempted to distinguish these cases (Br. of App., pp. 63-65), it is incredible that the Arizona Court would have used the language above quoted if it had known of their existence.

Furthermore, the Arizona Court makes a case for application of the due process clause in pointing out that the competitive Arizona State Fund is not placed under the same duty as the insurance companies:

> "If the risk asked to be written is, for any reason, such as the past bad experience of the employer, the dangerous place and kind of employment, the careless and reckless habits and indifference of the employer and employees, one in which the insurer is likely to be called upon to pay many and large compensations, *we do not think that even the Industrial Commission would be compelled to assume and write the risk.* One of its duties is to protect the state compensation fund. The statute gives the commission full authority over this fund (section 1410), and provides, in section 1411, that: 'The commission may, in its name, make contracts of insurance to in-

clude and cover the entire underlying liability of employers insured in the state compensation fund.'

"This language is permissive and not mandatory. The provisions of section 1422, however, leave to insurance companies no alternative; they must write all applications. There is no reason, real or apparent, for this provision unless it be that it was put into the law as a deterrent to private insurance companies to enter the field of compensation insurance in competition with the state compensation fund. If that was the motive, the law should have prohibited insurance companies from selling compensation insurance in Arizona and not undertaken to compel them to insure all applications regardless of the hazards." (48 Ariz. 402, 62 Pac. (2d) 320, 323; emphasis supplied.)

In respect to the Arizona *Frost* case, then, we suggest the correctness of the California Court's remark referring to this last element, "This ground of the decision is undoubtedly sound; the freedom of contract argument is not."

However, it should be noted that the *Frost* case and the Texas cases dealt with laws requiring that the insurer serve all qualified applicants, in effect an obligation somewhat analogous to that imposed upon a public utility. The Massachusetts law is somewhat milder, with its provision for determination of the reasonableness of requiring the insurer to issue or continue to carry the insurance (cf. *In re Opinion of the Justices,* 251 Mass. 569, 147 N.E. 681, at p. 701;

Factory Mutual Liability Ins. Co. v. Justices, 300 Mass. 513, 16 N.E. (2d) 38).

But all the laws discussed in the cases from Massachusetts, Texas, and Arizona had the requirement of service to all applicants at rates prescribed by State authority. As we shall point out hereafter in this brief this obligation is much more drastic than that imposed by the California statute and plan.

C. DECISIONS OF THIS COURT IN MANY FIELDS OF THE POLICE POWER SUSTAIN THE REASONABLENESS OF LEGISLATION OF THE GENERAL NATURE OF THAT HERE UNDER ATTACK.

1. The constitutional principles pronounced by this Court relating to governmental regulation for the public welfare, and the relevance thereto of the facts here involved.

Any discussion of police power decisions of this Court necessarily contemplates that, at most, these decisions are of but suggestive value, that they but illustrate situations in which this Court has pricked out the line which separates the permissible exercise of State power from the situations where that exercise violates Constitutional restrictions.

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business,

> or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the *reasonableness of each regulation depends upon the relevant facts.*"
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> * * * * * * *
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> "The Court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."[21]

And this Court has many times indicated that

> "* * * a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation."[22]

So the question here is as to the relevant facts which can be set forth in justification of the legislation here involved. This is the picture:

1. A substantial portion of the personal injuries and deaths in California arise out of motor vehicle accidents.[23]

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[21] *Nebbia v. New York*, 291 U.S. 502, 525, emphasis supplied.

[22] *Abie State Bank v. Bryan*, 282 U.S. 765, 772.

[23] In 1946, the year before the enactment of the legislation here attacked, the United States as a whole had a death rate of ten per thousand. California's was 9.9 per thousand. ("Statistical Abstract of the United States, 1948", pub. U.S. Dept. of Commerce, Bureau of the Census, p. 72.) But with respect to motor vehicle fatalities, the country-wide rate was 23.9 per 1000,000, while California's rate was 39.5 per 100,000. On the other hand, the country-wide death rate per hundred thousand for all accidents other than motor vehicle accidents was 46.2, whereas, California's rate was 43.2. (Ibid., p. 76.)

In 1947, the situation was substantially the same. The nation-wide death rate was 10.1 per thousand. California's rate was

2. Since 1929, legislation has increasingly penalized involvement in highway accidents by uninsured drivers, these penalties being apart from and in addition to the civil liabilities involved.[24]

3. The consequences have been:

(a) A considerable increase in the volume of automobile liability insurance written in California.[25]

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still 9.9. (Statistical Abstract of the United States, 1949", pub. U.S. Dept. of Commerce, Bureau of the Census, p. 71.) And the motor vehicle accident proportions are not significantly changed. The nationwide death rate for motor vehicle accident deaths was 22.8 per 100,000 while California's was 35.2. The nationwide death rate for accidents other than motor vehicle was 46.6 per 100,000, while California's rate was 41.7. (Ibid., p. 74.)

It appears from the above figures that on a nation-wide basis the motor vehicle accident death rate was about a third of the total rate of deaths from all accidents, whereas the California motor vehicle death rate was far nearer half than a third of the death rate from all accidents. Yet California's overall death rate was lower than the nationwide rate. The social interest of the people of California in the protection of highway accident victims and their dependents, and the economic burden on the public purse when adequate compensation is not available to the victim or his dependents, are obvious.

[24]See statutes discussed under "B. the statutes involved, and the history and background thereof", supra, and the statutes themselves as printed in Appendix A hereto.

[25]Sections 420, et seq., Vehicle Code, providing for summary suspension, without hearing, of the licenses of drivers involved in an accident unless they have insurance in force or post bond, or money with the Department of Motor Vehicles to cover a possible judgment against them, were enacted in 1947, effective in September of that year. The volume of premium on automobile liability insurance written in California increased from $127,281,410.69 written in 1947 to $161,273,534.64 written in 1948, an increase in 1948 of 28+% over that of 1947. (81st Ann. Rep. of the Ins. Commr. of California, p. XII.) This was also true of appellant, which wrote $2,305,032.12 of such premium in 1947 (80th Ann. Rep. of the Ins. Commr. of California, p. 281) and $2,985,796.47 of such premium in 1948. (81st Ann. Rep. Ins. Commr. of California, p. 282.) On the other hand, the total premium on all insurance written in the State increased from $993,029,469.42 written in 1947 to $1,121,830,562.67 in 1948, which is an increase of slightly under 13%, *including* the automobile liability. (81st Ann. Rep. of the Ins. Commr. of California, p. XV.)

(b) The creation of a group of persons who were equitably entitled, in the belief of the legislature, to insurance protection from the consequences of these statutes, but were unable to procure this insurance in the normal operation of the insurance market. (R. 174). The statute here involved is, of course, limited in effect to these people. (Cal. Ins. Code sec. 11620, and sec. 2400 R. 10).

4. For some years prior to 1947, all the insurance companies doing automobile liability insurance business in California had voluntarily maintained a plan whereby persons required to obtain automobile liability insurance in order to drive, but unable to procure it upon application to at least three insurance companies (R. 156), could apply to the office maintained by the plan and, if there found to be "in good faith entitled to" the insurance, were assigned to and issued policies by insurance companies, these risks being "assigned" among the companies in proportion to the premium on that type of insurance written in California by the particular insurer during the previous calendar year. (R. 152-166). Appellant was a member of the plan, but withdrew at the beginning of 1947. (R. 77, 106). The method of assigned risk plans was a normal and ordinary technique of the business.

5. There followed, in 1947, the enactment of the legislation and plan here attacked. They require the same sharing of risks by the companies on substan-

tially the same basis as the voluntary plan, except that they extend to all members of the class of those "in good faith entitled" to the insurance, instead of only those who, because of involvement in prior accident, or engagement in the commercial trucking business, were required by law to procure the insurance as a condition precedent to procuring or reinstating their driver's license. It contains provisions defining unworthy applicants and excluding them (R. 14-19) sets forth a procedure for application by and assignment of applicants (R. 21), prescribes rates and premiums, commissions, etc. (R. 25). It provides for an appeal by applicant, insured, or insurer, first to the governing committee of the plan, then to the State Insurance Commissioner (R. 30-31). It is significant that appellant has nowhere claimed that a lack of "procedural" due process exists in the plan, its attack is confined to the question of power to impose the obligation to subscribe as a condition of receiving a license to write this type of insurance.

These facts, it is respectfully urged, show the statute and plan to be reasonable and appropriate to the obvious and legitimate social ends to which it tends, indemnity for innocent victims of highway accidents and insurance protection to the automobile drivers and owners from drastic license penalties and loss. Insurance is a means of providing the indemnity and protection, the insurance companies are in the business of providing it, they unquestionably benefit by reason of increased business—there is no reason to believe that they will suffer actual loss by furnish-

ing the required insurance,[26] their failure, in the particular class of cases involved, to furnish the insurance, is impliedly found by the legislature to be unreasonable by virtue of the enactment of the legislation, and the legislation provides for the settlement by an impartial State official of disputes thereunder.

Even if loss to some of the companies should occur by reason of the risks accepted under the legislation, there is no evidence in the record to show that the loss will be of a confiscatory nature.[27]

2. Illustrative cases in this Court.

Of course, the case that comes nearest to a decision of this Court on legislation which would require an insurance company to accept applications for insurance as a condition of doing business in a State is *National Union Fire Insurance Company v. Wanberg,* 260 U. S. 71. The case is cited by appellant in support of its contention that the California statute is unconstitutional because it imposes upon insurance companies the obligation to make contracts. Appellant quotes from the Arizona Supreme Court's decision in *Employers' Liability Assurance Corporation v. Frost,* supra, to the effect that if the statute involved in the *Wanberg* case had required the insurance company to accept the business, this Court would

[26]An attempt at the departmental hearing to show a high loss ratio under the voluntary plan was rejected on ground of the difference of eligibility between the two plans. This difference has been commented on in detail in our supplementation of appellant's statement of the facts under the heading: "Character of the risks assigned under the law", supra, this brief and cf. Appendix B, infra. See also footnote 12, supra, this brief.

[27]See pp. 62-65, infra.

have held "that the limits of regulation had been transcended and the freedom of contract guaranteed by the Federal Constitution violated." (Br. of App., pp. 32-33).

But the *Wanberg* case *sustained* an exercise of State power. The North Dakota statute there involved provided, that unless an insurance company writing hail insurance in the State rejected an application for such insurance within twenty-four hours of the time it was received, it was on the risk as though it had accepted the application.

This Court sustained the constitutionality of the statute in the face of contentions that it violated the due process clause by forcing a contract on the insurance company and, because of danger of overcommitting the company in a given area, exposing the company to undue loss.

Appellant argues that the case impliedly supports its contention by quoting two statements by the Court: first, that the North Dakota legislation "approaches closely the limit of legislative power, but not that it transcends it". (260 U. S. 71, 76), and, second, that this North Dakota legislation "does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours". (260 U. S. 71, 76).

From these two statements appellant constructs a magnificent *tour de force:* "Since the North Dakota statute went to the verge[28] of the state's power, the

[28]By definition, "verge" may be an area as well as an edge or boundary. (Webster's International Dictionary, 2d ed., G. C. Merriam, 1941, pp. 2831-2832, cf. other meanings given therein.)

present (California) statute passes the line." (Br. of App., p. 32).

One finds a certain difficulty in accepting the reasoning which holds that because A is close to a limit B must be over the limit, and which implies, from a statement that an element is missing from a case, a principle that the missing element would, if present, violate the Fourteenth Amendment.

However, one feature of the problem presented the Court in the *Wanberg* case *could* have justified a dictum that an absolute requirement of acceptance on hail insurance contracts would have invalidated the statute. This was the presence of the danger of over-committal in a given area:

> "* * * It is urged that no company, to be safe and to make the business reasonably profitable, can afford to place more than a certain number of risks within a particular section or township, and that is what is called 'mapping' must be done to prevent too many risks in one locality and to distribute them so that the company may not suffer too heavily from the same storm." (260 U. S. 71, 76).

It should be noted that no such danger exists in the case of the California statute here involved, with the latter's provisions for "equitable apportionment" of the assigned risks among the insurers (Cal. Ins. Code sec. 11620, Br. of App., Appendix 1) its liability policy limits (Cal. Ins. Code sec. 11622; sec. 2406, R. 11) and the provision of the plan that the manager of the plan is to make the assignments "with due regard to exclusions under reinsurance agreements,

treaties or contracts filed with him in writing." (Sec. 2445, R. 21.)

The *Wanberg* case, in its willingness to sustain the legislation there involved on the basis of the public welfare policy behind the statute, supports appellee's contentions rather than appellant's. This Court there says:

> "* * * In that country," (North Dakota) "where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes, and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, *it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be effective for the purpose.*" (260 U. S. 71, 74; Emph. Sup.)

Surely cogent and analogous reasoning of the same sort sustains the statute here under attack.

We have already mentioned the many decisions of this Court sustaining State legislation drastically restricting the contract rights of insurance companies.[29]

In *Osborn v. Ozlin,* 310 U. S. 53, this Court, after citing the many instances of such restrictions of rights of insurance companies by various regulatory laws in the interest of the public welfare said:

> "* * * In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses,

[29] See cases cited in footnote 13, supra.

> flour mills, and other business ventures, *Green v. Frazier*, 253 U. S. 233, or might take 'the whole business of banking under its control', *Noble State Bank v. Haskell*, 219 U. S. 104, 113. If the state, as to local risks, could thus preëmpt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. *La Tourette v. McMaster*, 248 U. S. 465. All these are questions of policy not for us to judge. * * * The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control." (310 U. S. 53, 66.)

And this Court thereupon held constitutional a Virginia statute which required that insurance upon Virginia risks must be written through agents resident in and licensed by Virginia who should receive the entire commission on the business, except that not over fifty per cent of such commission might be paid non-resident brokers also licensed by Virginia.

In that case it was not mentioned that this Court *has* sustained State legislation whereby a State actually did take the whole of one part of the insurance business under its control. We refer to workmen's compensation insurance, and to legislation of the State of Washington which as part of its workmen's compensation system effectually excluded insurance companies from the business by requiring employers to insure against the liability for work men's compensation in a monopolistic state fund, through a system whereby the premium payments

were made in effect an occupational tax. In *Mountain Timber Co. v. Washington*, 243 U. S. 219, this Court sustained that legislation. This was not a restriction upon the insurance company's right to contract—it was in one leading field of casualty insurance[30] an *abolition* of the right.

By analogy—of course always perilous in police power cases—California, if its legislature determined it to be in the public interest, could eliminate automobile liability insurance and instead require every driver or owner in the State, to contribute to a State fund to reimburse losses of victims of traffic accident. Is it more destructive of contractual rights to permit the business to be done by insurance companies on condition that such companies subscribe to a system for equitable apportionment of drivers, other than the uninsurable drivers, who cannot obtain the insurance by ordinary methods?

Another analogous line of authority may be derived from this Court's decisions in the bank guaranty fund cases, of which the leading case was *Noble State Bank v. Haskell*, 219 U.S. 104,[31] cited in *Osborn*

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[30]The last published report of the California Insurance Commissioner, covering the year 1949, shows that out of a total of $1,144,024,547.03 of all insurance premium written in the State of California in that year, Workmen's Compensation premiums amounted to $97,806,815.84 or slightly over 8½ per cent of the total. (82nd Ann. Rep. of the Ins. Commr. of California, p. 398.) A relative picture may be presented by the fact that in the same year the California fire insurance premium amounted to $115,998,075.02 and the disability (accident and health) insurance premium to $88,103,413.04. (Ibid.)

[31]Cf., also *Shallenberger v. First State Bank*, 219 U.S. 114; *Assaria State Bank v. Dolley*, 219 U.S. 121; *Abilene Natl. Bank v. Dolley*, 228 U.S. 1; *Abie State Bank v. Bryan*, 282 U.S. 765.

v. Ozlin, supra. In that case the Oklahoma legislation provided for the creation and maintenance of a State guaranty fund to secure deposits in banks licensed by the State. It was to be established and maintained by assessments on State banks, measured by their average daily deposit balances. When the case came before this Court, the legislation was sustained on the basis of the importance of securing the safety of checks as currency in the commerce of the State, this Court saying:

> "* * * We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. *On the contrary, we are of the opinion that it may go on from regulation to prohibition except upon such condition as it may prescribe.* In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described co-operation are necessary safeguards, this court certainly cannot say it is wrong." (219 U. S. 104, 113; Emph. Supp.)

Earlier in the opinion the Court had said:

> "It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arrive. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355." (219 U. S. 104, 112.)

Another group of cases which form an analogy to the situation here present were the grain elevator cases of *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; and *Brass v. Stoeser*, 153 U. S. 401. The first two cases sustained the constitutionality of legislation of the States of Illinois and New York, imposing the status of a business "affected with a public interest" upon the business of storing and elevating grain, by regulating charges to be made for services rendered by that business. Those cases might be distinguished by reason of the fact that there existed in those States a practical monopoly by reason of the elevator owners' control of facilities and the desperate necessity, to business and agriculture, of the proper and reasonable use of the facilities. More analogous to the present situation, however, is the third case, which arose out of the prairies of North Dakota.

In that case, *Brass v. Stoeser*, 153 U. S. 391, state legislation defined persons operating grain elevators as "public warehousemen" and regulated their fees and charges. Brass, such an operator, refused to receive certain grain at the storage charges provided by the law, alleging they were too low, and a writ of mandate issued out of the State Court to require him to do so. The case came to this Court on writ of error to the North Dakota Court and this Court affirmed, holding that the power of the State to regulate the grain elevator business did not depend upon the fact of a practical monopoly by the elevator owners. In short, this Court held constitutional a law under which the elevator operator was required

to *make contracts*—of bailment of grain—at fees and charges and under conditions—maintenance in force of insurance by and at the expense of the operator covering the grain for the benefit of its owner—prescribed by the legislation.

Over many years, such cases as the *Munn, Budd,* and *Brass* cases, were referred to as cases involving business "affected with a public interest", a class of businesses sometimes described as "quasi-public" utilities, i.e., businesses which were not public utilities in the sense in which common carriers, water, gas, and power distributors, and similar organizations were, but which were subject to similar obligations of public service and similar regulation, adapted to the particular businesses, by virtue of the State's police power. The operators of such businesses were said to have "dedicated" the business to public service in analogy to the dedication of the property and business of a common carrier or public utility to a particular service to the public by acceptance of a franchise to operate such a service in a given territory or over a specified route.

In German Alliance Ins. Co. v. Lewis, 233 U. S. 389, fire insurance was held by this Court to be "affected with a public interest", so as to justify regulation of the rates charged therefor. The occasion of the case was a Kansas statute vesting in the Superintendent of Insurance of that State the power and duty of prescribing fire insurance rates and requiring fire insurance companies to adhere to the rates so prescribed. Plaintiff insurance company

sued to restrain enforcement of the statute in the Circuit Court of the United States for the District of Kansas and, from a dismissal following general demurrer sustained, it came to this Court on appeal.

It is significant that the arguments and philosophy urged by the plaintiff company were substantially the same as many of those urged in this case: interference with a private business which received no privilege from the State;[32] "taking of a private property for a public use;"[32] that the Act could not be justified as an exercise of police power "or of the power of the State to admit foreign corporations within its borders upon such terms as it may prescribe";[32] and "that the business of insurance is a natural right receiving no privilege from the State";[32] (233 U. S. 389, 405). But this Court said:

> "* * * It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the 'test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;' * * * Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. * * * The distinction, we think, has no basis in principle (*Noble State Bank v. Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated." (233 U. S. 389, 407.)

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[32] Cf. Br. of App., pp. 54, 55, 59, 66.

The Court then cited *Munn v Illinois, Budd v. New York,* and *Brass v. Stoeser,* supra, as illustrating the fact that "a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation." (233 U. S. 389, 411.)

It thus appears that, over thirty-seven years ago, the argument that regulation of a business in the public interest must be founded on a "dedication" to public service by the owner of that business, was emphatically rejected by this Court.

However, the "dedication" theory as a measure of the right of the State to impose police regulation on the ground of public interest was, we think, finally quashed in *Nebbia v. New York,* 291 U. S. 502, which upheld the constitutionality of the New York legislation regulating distribution of milk, particularly authorizing an administrative agency to prescribe the sale prices of milk. In course of the opinion, this Court said:

> "* * * The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, * * *. This view was negatived many years ago. *Munn v. Illinois,* 94 U. S. 113. The appellant's claim is, however, that this court, in there sustaining a statutory prescription of charges for storage by the proprietors of a grain elevator, limited permissible legislation of that type to businesses affected with a public interest, and he says no business is so affected except it have one or more of the characteristics he enumerates. But this is a

misconception. Munn and Scott held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves." (291 U. S. 502, 532.)

"The true interpretation of the court's language is claimed to be that only property voluntarily devoted to a known public use is subject to regulation as to rates. But obviously Munn and Scott had not voluntarily dedicated their business to a public use. They intended only to conduct it as private citizens, and they insisted that they had done nothing which gave the public an interest in their transactions or conferred any right of regulation. The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue," (291 U. S. 502, 533-534.)

3. This Court does not rest its determination as to the constitutionality of state police power legislation upon any distinction between statutes which compel the subject of the regulation to make a contract and those which merely prohibit an act or practice.

Much is said by appellant concerning interference with "freedom of contract" (Br. of App., pp. 18-19, 24-27, 32-42).

"* * * What is this freedom (of contract)? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution

> does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." (*West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 391.)

As we have stated above at the beginning of our discussion of the police power cases, this Court has always insisted that the basis for determination in each such case is the public policy concerned *in relation to the relevant facts.* In cases cited by appellant this Court has, in reply to a contention that the legislation under attack substituted compulsion for free contract, noted that the point was not well taken because the legislation did not require anyone to make a contract,[33] but it has not permitted the fact that the legislation compelled the making of contracts to constitute a constitutional distinction between permissible and non-permissible regulation.

Indeed, one of the early grain elevator cases affirmed a judgment granting a writ of mandate to compel an elevator operator to make: (1) contracts of bailment of grain with whoever offered the grain, without discrimination, and (2) insurance contracts

[33]Br. of App., pp. 32, 37-42.

with some insurance company for the benefit of the owner of the grain. (*Brass v. Stoeser,* supra.)

In *Phelps-Dodge Corporation v. Labor Board,* 313 U.S. 177, also cited by appellant,[34] this Court affirmed an order of the National Labor Relations Board which, to use the vigorous language of the dissenting opinion, ordered the employer "to hire applicants for work who have never been in his employ". (313 U. S. 197, 208.) But even the dissent raised no constitutional question, merely contended that such a construction of the statute granting the Board's powers was beyond the Congressional intent. (313 U. S. 197, 208-212.)

And, of course, as we have mentioned above, in *Mountain Timber Co. v. Washington,* 243 U. S. 219, the employer was totally deprived of his right to secure the payment of compensation liabilities by free contract with an insurance or bonding company and compelled, in lieu thereof, to contribute to a State fund.

It is interesting to note that, in accordance with the traditional reluctance of the Courts to go into issues not directly involved by reason of the facts in these police power cases,[35] when this Court, in *New York Central Railroad Co. v. White,* 243 U. S. 188 dealt with the compensation law of New York, which had a competitive State fund and allowed the employer to insure in that fund, in a qualified insurance company, or to self-insure, it refused to

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[34]Br. of App., p. 41.

[35]*Roig v. People of Puerto Rico,* 147 Fed. (2d) 87, 89, 90.

go into the question of the constitutionality of legislation which would require an employer to insure according to the first or second alternative, saying:

> "There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the State to impose." (*New York Central R. R. v. White*, 243 U. S. 188, 209.)

Only a few pages later in the same volume of reports, there is likewise a refusal to pass on the Iowa law which required the employer to insure in insurance companies on the ground that under the Iowa law, acceptance of the provisions of the compensation law by employers was optional with the employers. (*Hawkins v. Bleakly*, 243 U. S. 210, 219.)

Yet, in the next case in the same volume of the reports, *Mountain Timber Co. v. Washington*, 243 U. S. 219, where the question became a material issue because of compulsion both to accept the law and to insure in a State fund, this Court squarely sustained the constitutionality of the law.

As a matter of fact, the expressions in certain of the cases cited by appellant in its effort to distinguish between "compulsion to serve or to contract" and "regulation,"[36] are themselves applicable to the California legislation and plan here involved, since the writer in those cases was most obviously referring to *legal* compulsion as opposed to *economic* compulsion. An example is the quotation of one sentence

[36]Br. of App., p. 33.

from Justice Holmes' dissent in *Adkins v. Children's Hospital,* 261 U.S. 525, 570:[37]

> "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement * * *."

But the next sentence of the opinion is equally significant:

> "It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, *or unless the employer's business can sustain the burden.*" (261 U. S. 525, 570; Emph. Sup.)

In short, the writer was saying that the employer need not hire women at the prescribed minimum wage —he had the choice of going out of business if his business could not afford to pay the money.

But indeed, this is the choice in the case of many of the laws interfering with freedom of contract. In *Osborn v. Ozlin,* supra, the insurance company had the choice of paying the commission on Virginia risks to resident Virginia agents—i.e., *was compelled to make contracts* of agency with persons licensed as agents in Virginia—or stop writing Virginia risks. In *Hardware Co. v. Glidden,* 284 U. S. 151, the insurance company had the choice of making fire insurance contracts in the form prescribed by the particular State or of going out of fire insurance business in that State.

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[37]Br. of App., p. 42.

In the current matter, the appellant has the choice of writing automobile liability insurance in California on condition that it accept its equitable proportion of risks which the legislature has determined are in good faith entitled to insurance, or of refraining from doing that business in California. How this choice differs, in its essential qualities from a constitutional point of view, from those above specified has not been made apparent. How is this any more "the highwayman's order, 'Your money or your life',"[38] than the choices presented in the above cases?

II. THE STATUTE DOES NOT IMPOSE UPON APPELLANT, OR UPON ANY OTHER INSURER, ANY OBLIGATION TO SERVE THE PUBLIC GENERALLY.

Throughout this case and in all the tribunals through which this case has passed, appellant has insisted that the legislation here attacked has the effect of imposing upon it the obligation of a public utility to render its service to the general public and not to refuse to serve anyone tendering the price. This insistence alone justifies our taking up in argument that which is patent from the statement of facts, supra, the statute (Br. of App., Appendix I) and the plan (R. 10-32); that the main characteristic of this assigned risk plan method of securing coverage of all risks in good faith entitled to insurance is that it secures coverage *without* imposing the public utility type of obligation to serve all who apply, and permits adjust-

[38]Br. of App., p. 55.

ment of premium to secure adequate rates for risks which, in the eyes of underwriters at least, may be regarded as impaired but by no means uninsurable. Because a clear outline, without argument, of the actual working of the plan will be sufficient to show this, we here set it forth:

1. The plan is administered by a governing committee of five persons, each selected by the group of insurers, classified according to type of organization, included in the plan. The committee selects the manager of the plan and is responsible for its administration. The manager is the administrative executive of the committee and is subject to its direction. (Secs. 2420-2422, R. 12-14.)

2. There are extensive exclusionary rules directed to "screening" out the uninsurable, as distinguished from the merely impaired, risk. These exclusions are based on both physical hazards (mechanical and human, cf. secs. 2431.55 and 2437, 2431.4, 2431.85) and "moral hazards". (Secs. 2430-2438, R. 14-19.)[39]

3. Anyone unable to procure insurance by ordinary methods may apply to the plan for his insurance.[40] Form of application is prescribed in some detail. A five dollar fee is charged for taking the application, and is credited on the premium if the insurance is placed. The manager examines the application to de-

[39]See the California Court's description of these exclusionary provisions. (R. 179-180.)

[40]The insurance, of course, has limits of liability: $5,000 for injury to any one person; $1,000 for injury to any number of persons; $5,000 for damage to property (Sec. 2406, R. 11) as provided by Section 11622, Cal. Ins. Code.

termine eligibility, and if he so determines, forwards the application and fee to the insurer to whom he assigns the risk. (Secs. 2440-2444.5, R. 19-20.)

4. There are detailed provisions prescribing the method of determining assignments. The basic principle (Sec. 2445) is that each insurer's share of assignments shall be in the same proportion as its proportion of the California automobile liability insurance premiums. (Secs. 2445-2449.15, R. 21-23.)

5. Within twenty days after receipt of notice of assignment, the assignee insurer must accept or reject. If it accepts it must notify the applicant that upon receipt of the stated balance of the premium within 15 days—or a longer period if the insurer desires—it will issue the policy on the day following such actual receipt. If there be rejection, the manager and the applicant must be informed and the manager must be furnished the reasons why the insurer believes the applicant not to be "in good faith entitled, under the Plan, to insurance. The manager may within 5 days thereafter overrule the insurer, in which case the insurer must accept the risk."[41] (Secs. 2450-2453, R. 23-24.)

6. The accepting insurer normally makes its premium charge on the same basis as though the applicant were not under the plan, but, under certain circumstances may add certain surcharges. (Sec. 2460, R. 25, but see modification: ftn. 12 and Appendix B.)

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[41]Subject of course to the right of appeal given by Section 2495. (R. 30-31.)

7. Special provisions are included for adjustment upward of these premiums so computed, under unusual conditions and subject to the approval of the committee. (Sec. 2461, R. 25.)

8. There are also special provisions relating to agents' commissions, which are limited to a range from 5 to 10% of premium according to risk with a 2½% commission to certain agents for field supervision rendered (Secs. 2462-2463, R. 25.)[42]

9. With prior written approval of the manager, an insurer may cancel an assigned risk for subsequently developed reasons, generally, for which rejection in the first place would have been in order. (Secs. 2470-2472, R. 26.)

10. At close of policy period insured and insurer each have right to request change of assignment and provision for both normal renewal, renewal as an assignment, or re-examination of the risk by the manager is made. There are also somewhat elaborate provisions respecting the record of the insured during the assignment and its influence upon new assignment, etc. (Secs. 2480-2485, R. 26-29.)

11. The costs of administering the plan are assessed annually upon the subscribing insurers, in proportion to the California automobile liability insurance premium writings during the previous calendar year. (Secs. 2490-2491, R. 29.)

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[42]This agent's or broker's commission is much lower than on normally placed business, which averaged, nationwide, in a range of 17½% up, as given in Kulp, "Casualty Insurance", Rev. Ed., 1942, p. 597.

12. There are provisions prescribing the records and statistics to be kept, for appeals, for examination by the Commissioner and miscellaneous matters. Of particular interest should be Section 2495, which permits any "applicant, insured, or insurer" to appeal from the manager to the governing committee and from the governing committee to the Commissioner. Decisions of the Committee and of the Commissioner on appeals must be based on hearing the parties. (Secs. 2492-2498, R. 29-32.)

The foregoing outline should demonstrate that there is nothing of the nature of a public utility service obligation imposed on any subscribing insurer under the plan or statute. No member of the public can demand insurance under the plan from any insurer, but must accept the insurer to which he is assigned. The burden, if it be called that, of rendition of the services is carefully, though approximately, adjusted to the extent of the insurer's business of the type of insurance involved. Were it not for the fact that in all probability and in the long run, by reason of the adjustment of premium provided under the plan this type of business will pay its own way or at least not cause overall out-of-pocket loss to the insurers, the obligation to render the service under the statute and plan could be more nearly likened to a tax than a general public service obligation. Certainly, it more nearly resembles the type of obligation portrayed in *Mountain Timber Co. v. Washington* as a tax on the

employer, or in *Noble State Bank v. Haskell* as a condition to a license to act as a bank, than it does the obligation of a common carrier to transport all who request service on its route and tender the charge, or of a water or power distributor to serve all in its franchise territory.

III. NO QUESTION OF THE TAKING OF PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION IS PRESENTED HERE.

Appellant's brief (Br. of App. pp. 66-70) appears to be contending that in some way—not clearly specified by it—the legislation under its attack here constitutes a taking of its property without compensation.

But no evidence was *offered* or *introduced* to sustain such a contention.

At the hearing in the California Insurance Department, appellant offered in evidence a copy of the extra-statutory voluntary plan of assigning risks operated by the insurance companies with Departmental permission from 1942 to 1948. Objection on the usual grounds of incompetency, irrelevancy, and immateriality were sustained (R. 87), but, as the California rule in such cases requires the document to be preserved as part of the record,[13] it is here available. (R. 152-166.)

Appellant also, after testimony as to the loss record under the voluntary plan was likewise similarly rejected because of remoteness, dissimilarity between

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[13]Cal. Government Code, Section 11523.

the voluntary and compulsory plans (R. 86), made offers to prove (1) that the loss ratio for automobile liability under the voluntary plan during its life was .799 (R. 86, 101); (2) that the character of risks under that plan averaged a premium over 140 per cent of the normal premium for similar insurance (R. 92); (3) that the bodily injury loss ratio of appellant during that period was only .502 (R. 98) and (4) that, during that period, appellant wrote no risks of a character that took in excess of 100 per cent of the normal premium. (R. 100.)

There would seem to be no question that the hearing officer properly rejected the evidence offered and that the Superior Court properly so found. A comparison of the eligibility provisions of the two plans shows that, under the voluntary plan, insurance was restricted to those compelled to procure it in order to drive (Sec. 1, R. 152-153), whereas, the compulsory plan was open to *all* who were in good faith entitled to insurance, but could not procure it by ordinary methods. (Sec. 2400, R. 10.) It can be easily seen that the difference between the groups of applicants involved is great. While the latter may include the former, the indications that the group members not in the former will greatly improve the loss record of the group as a whole are overwhelming, particularly in view of testimony brought out by appellant that the compulsory plan will have four times the number of applicants. (R. 92.) Since the voluntary plan presumably included all those required by law to get the insurance in order to secure their licenses, it follows that three-fourths of the risks under the compulsory

plan will be of a better class of driver than under the voluntary plan and that the overall experience of that voluntary plan will not be indicative of compulsory plan experience."

However, we face the further fact that, even if all the facts offered to be proved by appellant relative to loss ratios had been proved, and even if the old and new plans had been identical, no case of confiscation under the constitution would have been made because:

(1) The record is barren of evidence or offer of proof as to the cost of doing business which would have thrown light on appellant's offered proof by showing whether or not actual loss to the insurers would occur from the bodily injury loss ratios offered to be proved. For, if the cost of doing business (including reasonable compensation) did not exceed the difference between the loss ratios offered to be proved and the premium received, where would there be confiscation?

(2) The offered proof could have shown only that the average *aggregate* loss ratio for the business done under the voluntary plan as a whole was much greater than appellant's average loss ratio. But as departmental counsel at the departmental hearing forcibly pointed out (R. 82), proof of aggregate experience of all insurers engaged in the business in the State is no basis for a showing of confiscation in the constitutional sense as to one of them. *Aetna Insurance Co. v. Hyde*, 275 U.S. 440.

"See our "Supplementation of Appellant's Statement of the Case", supra, this brief, under the heading: "Character of the Risks Assigned Under the Law".

In that last case the fire insurance companies doing business in Missouri sued as a group to set aside state-prescribed rates, claiming they were confiscatory and submitting proof of aggregate premiums received and losses by the companies writing the business. In dismissing the application for the writ of certiorari to the Missouri Supreme Court which had sustained the rates, this Court said:

> "* * * It has never been and cannot be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business. * * * In order to invoke the constitutional protection, the facts relied on to restrain the enforcement of rates prescribed under the sanction of state law must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny the plaintiff just compensation and deprive it of its property without due process of law." (275 U.S. 440, 447.)

It is respectfully submitted, therefore that no issue of confiscation arises in this case.

IV. APPELLANT'S CONDUCT OF THE INSURANCE BUSINESS, AND ITS METHOD AND FORM OF ORGANIZATION, ARE NOT LESS PRIVILEGES GRANTED BY THE STATE, NOR LESS SUBJECT TO REGULATION, THAN THAT OF ANY OTHER INSURER.

We have, in our supplementation of appellant's statement of the case under the heading: "A. Identity and nature of appellant",* discussed its form of organization. It can best be visualized as a sort of limited partnership. It has many of the characteristics of a corporation. Certainly, by reason of the legislation therein mentioned, its members for whom it carries on the business have been granted by the legislature the limited liability characteristic of corporate operation. The effectiveness of this legislation appears to be unquestioned by the California Courts. *Hansen v. Farmers Auto. Inter-Insurance Exch.*, 139 Cal. App. 388, 34 Pac. (2d) 188; *Mitchell v. Pacific Greyhound Lines, Inc.*, 33 Cal. App. (2d) 53, 91 Pac. (2d) 176. Nor has the legislative power to grant the privilege of doing business under such limitations been questioned in this Court. *Giles v. Vette*, 263 U.S. 553. This Court also has sustained legislation drastically regulating, and changing pre-existing regulations concerning, such reciprocal or interinsurance exchanges. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313. In the *Hoopeston* case, particularly, this Court pointed out that the purported cooperative character of the organization called for no constitutional distinction between the legislative power to regulate it and the power to

*p. 2, supra.

regulate other business organizations transacting insurance business:

> "The appellants earnestly insist that theirs is a successful system of cooperative insurance which gives complete security with substantial economy to their members, and that their New York subscribers may lose the benefits of this form of insurance by reason of the reciprocals' inability to comply with the requirements of the New York law. That the reciprocals save for their members from 25 to 50 per cent of the cost of ordinary commercial insurance and that the members are well satisfied with the system they have created is not controverted by counsel for the state of New York. However persuasive such arguments might be if addressed to the state legislature, they present no constitutional barrier which prevents New York from enforcing these regulations if it chooses." (318 U.S. 313, 321-322.)

In view of the decisions relating to the legislative right to enact and change the statutory provisions governing appellant's organization, taken together with the decisions previously referred to in this brief which again and again declare the insurance business to be peculiarly subject to regulation in the public interest,[45] it is respectfully submitted that the doing of business by appellant is no less a privilege granted by the state and subject to the same regulation by the State as in the case of insurers having other forms of organization.

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[45]See footnote 13, supra, and insurance cases discussed under heading: "Decisions of This Court Sustain a Broad Regulatory Power of the States Over the Insurance Business", supra.

V. THE DOCTRINE OF "UNCONSTITUTIONAL CONDITIONS" IS NOT HERE INVOLVED.

Appellant would attempt to invoke the doctrine of unconstitutional conditions, claiming that the fact that appellant is now doing insurance business in the State of California gives the State no right to impose upon it a regulation, otherwise unconstitutional. None of the cases cited by appellant, nor the doctrine, holds that an exercise of the police power in the interests of the public welfare, and which reasonably tends to promote the proper objective of that welfare by appropriate means becomes unconstitutional because made a condition to doing business in the State. These cases all deal with situations where a deprivation of constitutional rights is made a condition to permission to do business in the State. (App. Br., pp. 55-59.)

If the statute here involved, taken in connection with the statutes with which it must be construed, is unconstitutional, we, of course, cannot claim that the fact that compliance is made a condition of doing an automobile liability insurance business in the State will in itself, cure the unconstitutionality. Our contention is that the purpose and objective of the statute is constitutional and the means are appropriate, not forbidden, and that therefore compliance is a reasonable condition to the permission to transact the business of automobile insurance in the State of California.

VI. COMMENT ON CERTAIN POINTS URGED AND CASES CITED BY APPELLANT.

On page 25 of appellant's brief are cited a number of cases which purport to assert absolute freedom of contract. None of them purport to assert such freedom as against reasonable legislative regulation. Ultimately, the freedom of contract argument here must depend upon whether or not the regulation is reasonable.

On page 26 there is set forth a quotation from the case of *K. C. Working Chemical Co. v. Eureka Security Fire & M. Ins. Co.*, 82 Cal. App. (2d) 120, 131, 185 Pac. (2d) 832:

> "An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason".

Despite the phraseology involved, and leaving apart the fact that a higher Court of the same State has approved the legislation here involved, a reading of the case itself shows that neither it nor the authorities therein cited dealt with legislative provisions. There have been a number of similar statements by Courts. Perhaps the best relevant comment on such pronouncements is given in a note in 107 A.L.R. 1413, in which the writer says:

> "There are, as above indicated, many cases in which statements are made to the effect that an insurer is not bound to accept an application for insurance, but these cases generally do not involve express legislation on the subject and do not discuss the effect of the fact that the insurance busi-

ness is affected with a public interest." (107 A.L.R. 1413, 1424.)

Like comment is applicable to *Winship v. Bank of the U. S.*, 5 Pet. 529, at 560, *Karrick v. Hannaman*, 168 U.S. 328, and *London Assurance Co. v. Drennen*, 116 U.S. 461, 472, cited on the same page.

The point urged and the cases set forth on pages 32 and 33 of appellant's brief, contending that the authorities directly bearing on the power to compel the issuance of insurance show the statute here involved to be unconstitutional, have been discussed and answered in a previous section of this brief discussing the case of *National Fire Insurance Company v. Wanberg*, and the Texas and Massachusetts cases involving similar problems.

We have not, however, covered certain of the cases cited by appellant in its argument that there is a difference between regulation and compulsion to serve or to contract. (Br. of App., pp. 32-46.) These cases, when themselves examined, or when considered in connection with subsequent cases drastically modifying certain broad implications of the holdings in the cases themselves, do not sustain the point apparently attempted to be made by appellant, that is, that where the legitimate and proper interest of the State calls for regulation, such regulation cannot include a compulsion to service. It is argued that *Nebbia v. New York* merely subjected all business to the same broad power of regulation as that to which insurance had long been subject. With this we have no argument, but wish to

point out that the *Nebbia* case did establish beyond question that the test to be applied by the Courts under the guarantee of due process is only "that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (291 U.S. 502, 525.)

On page 35 of the brief, the citation of the *German Alliance* case is made the occasion for a remark that the case shows the difference between the power to regulate and the power to compel service. This is necessarily appellant's own interpretation—it does not withstand a reading of the case. The case actually, carefully read, merely accepts the fact that existing legislation did not grant, to the public, the power to compel service. This Court held, that, even in the absence of that power, the State could regulate and regulate drastically. The plaintiff therein contended that no regulation under the police power was valid in the absence of a right in the public to compel the service. The Court held otherwise. It did not discuss at all whether or not the public could, by legislation, be given a right to compel the service.

However, perhaps the best light upon the law which appellant would present to this Court is shown by the citation on page 37 of such cases as *Frost and Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, 592, *Michigan Commission v. Duke*, 266 U. S. 570, and *Smith v. Cahoon*, 283 U. S. 553, 563, without also citing *Continental Baking Co. v. Woodring*, 286 U. S. 352, *Sproles v. Binford*, 286 U.S. 374, and

Steele v. General Mills, 329 U. S. 433. It is perfectly true that the cases cited by appellant on page 37 of its brief are holdings that a contract carrier cannot be compelled to become a public utility. It was the later cases, commencing with the *Continental Baking Company* case, which held that *in the interest of conservation of the highways* (an element which this Court apparently felt was absent in the prior cases), while such a contract carrier could not be made a public utility in the absence of its dedication to that purpose, it could be required to pay a ton-mile tax in common with common carriers, it could be required to carry liability insurance to protect the public (*Continental Baking Co. v. Woodring,* supra), size and load limits could be imposed upon it (*Sproles v. Binford,* supra), it could be required to obtain a permit *and the permit could be denied where the efficiency of the common carrier service then adequately serving the same territory would be impaired by permitting the contract carrier to operate,* and it could be required to charge the same minimum rate for carriage imposed upon the common carriers, (*Stephenson v. Binford,* 287 U.S. 251), and that despite the fact that it operated only under private contract, the rates prescribed by the Texas regulatory commission entered into those contracts and it could not charge a lower rate thereunder. (*Steele v. General Mills,* supra.) In short, this line of cases again summarizes the fact that police power legislation will be confined by this Court to the service of a proper end in the public interest, but, where such interest is shown, the doctrine of the *Nebbia* case applies.

In *Champlin Refining Co. v. United States,* 329 U. S. 29, *Roig v. People of Puerto Rico,* 147 Fed. (2d) 87, and *Fordham Bus Corporation v. United States,* 41 Fed. Supp., 712, (Br. of App. pp. 39-40), the Court merely pointed out that the statute or the administrative agency had not theretofore employed the element of compulsion to give service, and therefore that the question need not be discussed further. Traditional reluctance of the court to pass upon constitutional questions not present in the issues of the case (*Roig v. People of Puerto Rico,* 147 Fed. (2d) 87) and the like traditional reluctance of the Court to enforce personal service contracts (*Phelps-Dodge Corp. v. Labor Board,* 313 U. S. 177, 211) is here seized upon as an intimation that there is something unconstitutional about compulsion of personal service which is not at all intimated by the cases. In view of the point purported to be made, it is somewhat remarkable to find on page 40 of the brief a reference to *Lincoln Federal Labor Union v. Northwestern I. & M. Co.,* 335 U. S. 525, which upheld Nebraska and North Carolina laws, which, in one case, forbade employers to discriminate in hiring between union and non-union workers, i.e., restricted their freedom of contract and employed a compulsion to contract with the union or the non-union workers and in the other case forbade them to make contracts providing for such discrimination. The only cases cited by appellant in this section of its brief, which constitute affirmative holdings of this Court that a particular statute which compelled the making of a contract violated constitutional restrictions are

Thompson v. Consolidated Gas Co., 300 U. S. 55, cited on page 35 of appellant's brief, and the motor trucking cases cited on page 37. The motor trucking business cases we have already commented on. The *Thompson* case, on the other hand, involved a finding by the trial Court that the legislation did not serve a proper State interest and was not an appropriate measure. Of course, such an issue is not here involved.

We shall not go into much detail relating to appellant's fourth point, i.e., that even under public utility law, the statute could not compel appellant to insure non-members because that is beyond the scope of its "dedication." (Br. of App., pp. 42-55). However, there are some matters as to which comment is necessary. We find on pages 44 and 45, the common carrier truck cases cited again, without the later cases which materially modified them. We have no disagreement with the doctrine which appellant claims applies here, i.e., that a public utility cannot, in the ordinary case, be required to serve beyond the scope to which it has voluntarily dedicated itself. The answer, of course, is that given before the beginning of the century in the grain elevator cases (*Munn v. Illinois, Budd v. New York,* and *Brass v. Stoeser,* supra), reiterated in *German Alliance Insurance Co. v. Lewis,* supra, and again emphatically set forth in *Nebbia v. New York,* supra, that where the public interest in a business requires its regulation, the validity of that regulation is to be measured only by the appropriateness and reasonableness of the regulation

The same cases pointed out that the failure to voluntarily dedicate the business to the public service was no barrier to proper regulation.

We must also reply, and that emphatically, to appellant's argument that service to the members of the California State Automobile Association is the utmost limit of appellant's dedication, and that it is a cooperative which cannot be compelled to serve any but its members. (Br. of App., pp. 46-55). In the first place, there is no evidence in the record or anywhere else, that appellant or any other insurance company has dedicated its services to any particular group. In fact, while the California Court pointed out that the only resemblance to any formal dedication was found in the law under which appellant operated (R. 193), this was merely a realistic way of calling attention to the fact that there never has been any real dedication at all. The evidence showed, for instance, that there was no dedication to the service of members of the California State Automobile Association, inasmuch as appellant declined to insure such members when it found such declination advisable. (R. 75).

On the same basis, insurance companies which have drawn the color line, could claim that they have never dedicated their businesses to serve Negroes. Other companies could argue that they had never dedicated themselves to serve drivers who had one conviction of reckless driving against them, others that they had never dedicated their business to the service of drivers under the age of twenty-one. If that be what

appellant means by dedication, it is meaningless in this connection.

Likewise, the claim that "since its inception in 1914, appellant's power of attorney has provided that 'only members in good standing of the California State Automobile Association, or corporations or firms in which such members are officers or partners may be eligible to apply for insurance in the bureau' " is no basis for the argument that because the reciprocal law permits such restrictions in the power of attorney, this legislation is unconstitutional because it would compel appellant to change its basic charter. (Br. of App. pp. 24, 42-51). Actually, examination of the evidence shows that the restriction is not in the power of attorney, but is in the rules and regulations (R. 113, 124, 132-133) and the rules and regulations have long provided for amendment by the governing board of appellant. (R. 125, 134).

Likewise, with the argument that a cooperative may not be compelled to serve its non-members (Br. of App., pp. 52-54), we have here again the citation of *Frost Trucking Co. v. Railroad Commission,* one of the earlier of the highway trucking cases, without consideration of the modifications made by the later cases, and we have here cited a series of cases, each of which held that a trucking company carrying solely for the members of a cooperative could not be compelled to carry for others. None of these latter cases, however, refer to any constitutional objection to legislation in furtherance of a proper state interest, such as the public welfare, as in this

case, and requiring service as a means appropriate to the carrying out of the purposes of that legislation. On all cases of this type, we think that the remark of the Court in *Fordham Bus Corp. v. United States, et al.*, 41 Fed. Supp. 712, is apropos:

> "* * * A private carrier cannot, says the plaintiff, be converted, by legislative fiat, into a common carrier and thereby be subject to regulations which are valid solely with respect thereto. In support of its contention, plaintiff cites such cases as *Michigan Public Utilities Commission v. Duke* * * * and *Frost Trucking Company v. Railroad Commission* * * *; cf. *Smith v. Cahoon* * * * but the basic postulate of those decisions was destroyed by the later decision in *Nebbia v. New York* * * *, which held that 'there is no closed class or category of * * * businesses affected with a public interest.' The court there said: 'And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory, it does not lie with the court to determine that the rule is unwise.' * * * It is significant that the earlier cases cited by plaintiff were also cited in the dissenting opinion in the *Nebbia* case to show that the majority opinion was inconsistent with the prior precedents." (41 Fed. Supp. 712, 715.)

In the *Fordham Bus* case a three-judge Federal District Court sustained the Interstate Commerce Commission in classifying the Fordham Bus Company as a "common carrier" under the statute instead of a "contract carrier" on the basis of its charter and special operations. In the same case

the court also pointed out that a number of cases there cited by plaintiff such as is true of most of the cases cited on pages 52 and 53 of appellant's brief, merely held that the trucking company was not a common carrier as that term was defined in the particular statute, rather than deciding any constitutional question. (41 Fed. Supp., 412, 716.)

Pages 54 and 59 to 60 of appellant's brief are devoted to the thesis that appellant's right to do business is not a privilege derived from the State, the argument being made that appellant not being a corporation, it does not draw its existence from the State. We have heretofore discussed in some detail appellant's organization and the laws under which it operates, and here merely refer to that discussion.[46] This is no mere association of individuals engaged in a business conducted without special and peculiar legal privileges granted by legislation. On the contrary, appellant has by its own choice elected to operate under legislation whereby its members so associating for the purpose of the business do so with as complete freedom from personal liability, or with as complete limitations of personal liability, as the policyholder of any mutual insurance corporation. Precious as is the right of freedom of association, it, also, like freedom of contract, may properly be limited by the State when used for purposes contrary to the public policy of the State.

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[46]See our discussion under the heading "IV. Appellant's Conduct of the Insurance Business, and Its Method and Form of Organization, Are Not Less a Privilege Granted by the State, Nor Less Subject to Regulation, Than that of Any Other Insurer", supra, p. 66, and supra, p. 2.

James v. Marinship Corporation, 25 Cal. (2d) 721, 155 Pac. (2d) 329; *Riviello v. Journeymen Barbers, etc., Union*, 88 Cal. App. (2d) 499, 199 Pac. (2d) 400.

These facts as to appellant's organization, taken together with the further fact that the business transacted is one which has traditionally been held to be affected with a public interest and subject to a broad power of State regulation would seem to constitute a conclusive answer to appellant's claim that its right to do business is not a privilege derived from the State. On the contrary, its very basis for doing business is a privilege conferred by the State, and the rules and regulations incorporated in its powers of attorney so express the agreement of its members among themselves.

CONCLUSION.

Many States have enacted legislation which creates a legal or practical compulsion upon their inhabitants to procure a particular kind of insurance as a condition precedent to engaging in a certain necessary or essential activity in that State. In a number of these States, the legislature has recognized that the free play of economic activity will not suffice to make available the insurance thereby made necessary, and has determined that its inhabitants, or a reasonably classified group of those inhabitants, are entitled to the insurance. Different States have enacted different statutory solutions to this problem. Among these

solutions have been the monopolistic State insurance fund,[47] the competitive State insurance fund,[48] the requirement that the insurers engaged in the particular field of insurance accept all applicants,[49] the requirement that rejection by one of those insurers be subject to the determination of a State board as to reasonableness,[50] the approval of a voluntary assigned risk plan,[51] and the compulsory assigned risk plan here under attack by appellant[52].

This Court and all other Courts which have passed on any of these various statutory solutions of the problem have in each case approved the particular solution before them, except in one case where the solution involved unfair discrimination between types of insurers operating in the particular field of insurance there involved.[53] That element of discrimination is not present here—in fact, appellant's contention as to the effect of its form of organization and peculiar "dedication" is in cold fact a plea of invalidity on the ground that there is no such discrimination here (R. 202.)

It is therefore respectfully submitted that the ends of public policy and the long stated and restated principles under which this Court acts concerning

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[47] *Mountain Timber Co. v. Washington*, 243 U.S. 219.
[48] *New York Central Railroad v. White*, 243 U.S. 188.
[49] *Texas Employers' Insurance Association v. U. S. Torpedo Co.* (Tex.), 26 S.W. (2d) 1057.
[50] *In re Opinion of the Justices*, 251 Mass. 569, 147 N.E. 681.
[51] California Ins. Code, Sections 1110(c), 1111-1113.
[52] See footnote 14, supra.
[53] *Employers' Liability Insurance Company v. Frost*, 48 Ariz. 402, 62 Pac. (2d) 320.

the exercise of the State's police power, call for affirmance of the California Court's judgment in this case.

Dated, San Francisco, California,
February 23, 1951.

Respectfully submitted,

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(Appendices A, B, C and D Follow.)

Appendix A

PROVISIONS OF CALIFORNIA STATUTES WHICH CONSTITUTE COMPULSIONS, ADDITIONAL TO NORMAL CIVIL LIABILITY FOR DAMAGES, UPON AUTOMOBILE DRIVERS TO PROCURE INSURANCE, AS THEY APPEARED IN 1948.

(a) *Vehicle Code* Sections:

402. (a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

(b) The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of five thousand dollars ($5,000) for the death of or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of ten thousand dollars ($10,000) with respect to the death of or injury to more than one person in any one accident and is limited to the sum of one thousand dollars ($1,000) for damage to property of others in any one accident.

(c) In any action against an owner on account of imputed negligence as imposed by this section, the

operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State. Upon recovery of judgment, recourse shall first be had against the property of said operator so served.

(d) In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence, such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle of the owner within the meaning of subdivisions (c) and (d) of this section.

(e) Where two or more persons are injured or killed in one accident, the owner may settle and pay any bona fide claim or claims for damages arising out of personal injuries or death, whether reduced to judgment or not, and such payments shall diminish to the extent thereof the owner's total liability on account of such accident; and payments so made aggregating the full sum of ten thousand dollars ($10,000) shall extinguish all liability of the owner hereunder to said claimants and all other persons on account of such accident which liability may exist by reason of

imputed negligence pursuant to this section, and not arising through the negligence of the owner nor through the relationship of principal and agent or master and servant.

(f) If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section.

410. (a) The department shall suspend the privilege of any person to operate a motor vehicle upon a highway or the operator's or chauffeur's license issued to him evidencing such privilege, and the registration cards and license plates issued for all motor vehicles registered in the name of such person, upon receiving a copy of a judgment as hereinafter described, and a certificate of facts relative to such judgment, on a form provided by the Department, indicating that such person has failed for a period of thirty days to satisfy any final judgment rendered against him in amounts and upon a cause of action as hereinafter stated.

(b) The judgment hereinbefore referred to shall mean a final judgment of any court of competent

jurisdiction in this or any other State or of the United States against a person as defendant upon a cause of action as hereinafter stated.

(c) The judgment herein referred to shall mean any final judgment for damage to property in excess of $100 or for damage in any amount on account of bodily injury to or death of any person resulting from the operation by said judgment debtor or any other person of any motor vehicle upon a highway except any judgment based upon statutory liability by reason of signing the application of a minor for an operator's or chauffeur's license.

(d) The suspension hereinbefore required shall remain in effect and no motor vehicle shall be registered in the name of such judgment debtor nor any license issued to such person unless and until such judgment is satisfied in full or to the extent hereinafter provided and until the judgment debtor gives proof of financial responsibility in future as hereinafter provided, subject to the exemption stated in section 411.5.

(e) A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this chapter.

410.5. The clerk of a court or the judge of a court which has no clerk shall forward to the department a certified copy of any judgment or a certified copy of the docket entries in an action resulting in a judgment for damages, and a certificate of facts relative

to such judgment, on a form provided by the department, the rendering and nonpayment of which judgment requires the department to suspend the operator's or chauffeur's license and registrations in the name of the judgment debtor hereunder, such document to be forwarded to the department immediately upon the expiration of thirty days after such judgment has become final and when such judgment has not been stayed or satisfied within the amounts specified in this chapter as shown by the records of the court.

411. Whenever after one such judgment is so satisfied and said proof of ability to respond in damages is given, another such judgment is rendered against said person for any accident occurring prior to the date of the giving of said proof and such person fails to satisfy the latter judgment within the amounts specified herein within fifteen days after the same became final, then the department shall again suspend the operator's or chauffeur's license of such judgment debtor and the registration cards and license plates issued for all motor vehicles registered in the name of such judgment debtor as owner and shall not renew the same and shall not issue to him any operator's or chauffeur's license or a registration card or license plate for any motor vehicle while such latter judgment remains unsatisfied and subsisting within the amounts specified herein.

411.5. Any person whose operator's or chauffeur's license or certificate of registration has been sus-

pended, or is about to be suspended or shall become subject to suspension under the provisions of this chapter, may relieve himself from the effect of such judgment as hereinbefore prescribed in this chapter by filing with the department an affidavit stating that at the time of the accident upon which such judgment has been rendered he was insured, that the insurer is liable to pay such judgment, and the reason, if known, why such insurance company has not paid such judgment. He shall also file the original policy of insurance or a certified copy thereof, if available, and such other documents as the department may require to show that the loss, injury or damage for which such judgment was rendered, was covered by such policy of insurance.

If the department is satisfied from such papers that such insurer was authorized to issue such policy of insurance in the State of California at the time of issuing such policy and that such insurer is liable to pay such judgment, at least to the extent and for the amounts hereinbefore provided in this chapter, the department shall not suspend such license or licenses and such certificate or certificates, or if already suspended, shall reinstate them.

413. Every such judgment shall for the purposes of this chapter be deemed satisfied:

(a) When five thousand dollars has been credited, upon any judgment in excess of that amount, or upon all judgments, collectively, which together total in excess of that amount, for personal injury to or death of one person as a result of any one accident.

(b) When, subject to said limit of five thousand dollars as to one person, the sum of ten thousand dollars has been credited, upon any judgment in excess of that amount, or upon all judgments, collectively, which together total in excess of that amount, for personal injury to or death of more than one person as a result of any one accident.

(c) When one thousand dollars has been credited, upon any judgment in excess of that amount, or upon all judgments, collectively, each of which is in excess of one hundred dollars, and which together total in excess of one thousand dollars, for damage to property of others as a result of any one accident.

414. Proof of ability to respond in damages when required by this code means proof of ability to respond in damages resulting from the ownership or operation of a motor vehicle, and arising by reason of personal injury to, or death of, any one person, of at least five thousand dollars ($5,000), and, subject to the limit of five thousand dollars ($5,000) for each person injured or killed, of at least ten thousand dollars ($10,000) for such injury to, or the death of, two or more persons in any one accident, and for damage to property in excess of one hundred dollars ($100) or at least one thousand dollars ($1,000) resulting from any one accident. Such proof of ability to respond in damages may be given in any manner hereinbelow.

(a) Proof of ability to respond in damages will be given by the written certificate or certificates of

any insurance carrier duly authorized to do business within the State, that it has issued to or for the benefit of the person named therein a motor vehicle liability policy or policies as defined in Section 415, which, at the date of said certificate or certificates is in full force and effect, and designated therein by explicit description or by other appropriate reference all motor vehicles with respect to which coverage is granted by the policy certified to. The department shall not accept any certificate or certificates unless the same cover all motor vehicles registered in the name of the person furnishing such proof, except that this provision shall not apply to vehicles in storage; provided, the current license plates and registration cards are surrendered to the Department of Motor Vehicles in Sacramento. Additional certificates shall be required to furnish such proof. Said certificate or certificates shall certify that the motor vehicle liability policy or policies therein cited shall not be canceled except upon 10 days' prior written notice to the department.

(b) Proof of ability to respond in damages may be given by the bond of a surety company duly authorized to do business within the State, or a bond of individual sureties each owning unencumbered real estate, approved by a judge of a court of record. Such bond shall be conditioned for the payment of the amount specified in this section, and shall provide for the entry of judgment on motion of the State in favor of any holder of any final judgment on account

of damages to property over one hundred dollars ($100) in amount, or injury to any person caused by the operation of such person's motor vehicle, in the same manner as provided in Section 942 of the Code of Civil Procedure for the entry of judgment upon appeal bonds.

(c) Proof of ability to respond in damages may be given by the deposit with the department by such person of eleven thousand dollars ($11,000) which amount shall be deposited in a special deposit account with the State Controller for the purpose of this section. The department shall not accept a deposit of money where any judgment or judgments theretofore recovered against such person as a result of damages arising from the operation of any motor vehicle shall not have been paid in full.

Money heretofore deposited with the State Treasurer for the purposes set forth in this section shall be paid to the department by the State Treasurer for deposit with the State Controller for the purposes of this section.

415. (a) A "motor vehicle liability policy," as used in this code means a policy of liability insurance issued by an insurance carrier authorized to transact such business in this State to or for the benefit of the person named therein as assured, which policy shall meet the following requirements:

(1) Such policy shall designate by explicit description or by appropriate reference all motor ve-

hicles with respect to which coverage is thereby intended to be granted.

(2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured.

(3) Such policy shall insure every said person on account of the maintenance, use or operation of every motor vehicle therein covered within the continental limits of the United States against loss from the liability imposed by law arising from such maintenance, use or operation to the extent and aggregate amount, exclusive of interest and costs, with respect to each such motor vehicle, or five thousand dollars ($5,000) for bodily injury to or death of each person as a result of any one accident and, subject to said limit as to one person, the amount of ten thousand dollars ($10,000) for bodily injury to or death of all persons as a result of any one accident and the amount of one thousand dollars ($1,000) for damage to property of others as a result of any one accident.

(b) Such policy shall (1) Cover the assured in the use or operation of all vehicles owned by him or registered in his name but not insuring such person when operating any motor vehicle not owned by him, or

(2) Cover the assured in the use or operation of all vehicles owned by him or registered in his name and insure such person in the operation of any motor vehicle not owned or registered in his name, or

(3) Cover the assured only in the operation of any motor vehicle not owned by him nor registered in his name, or

(4) Cover the assured only in the operation of a certain vehicle of vehicles not owned by him nor registered in his name.

(c) Any such policy may grant any lawful coverage in excess of or in addition to the coverage herein specified or contain any agreements, provisions or stipulations not in conflict with the provisions of this code and not otherwise contrary to law.

(d) Any liability policy issued hereunder need not cover any liability for injury to the assured or any liability of the assured assumed by or imposed upon said assured under any workmen's compensation law nor any liability for damage to property in charge of the assured or the assured's employees or agents.

(e) The provisions of subsection (b), parts (1) and (2), shall not apply to vehicles in storage; provided, the current license plates and registration cards are surrendered to the Department of Motor Vehicles in Sacramento.

417. The department shall upon request cancel any bond or any certificate of insurance, or the department shall direct the return to the person entitled thereto of any money or securities deposited pursuant to this code as proof of financial responsibility, or the department shall waive the requirement heretofore or hereafter imposed of filing proof of financial responsibility in any of the following events:

(a) When such person is no longer required to maintain such proof under the provisions of this code.

(b) At any time after three years from the date such proof was required when, during the three-year period immediately preceding the request, the person required to furnish such proof: (1) has not been convicted of any offense authorizing or requiring the suspension or revocation of a license by the department, and (2) has not suffered suspension or revocation of license upon order of the department or a court arising from a conviction of a violation of the law.

(c) Upon the death of the person on whose behalf such proof was filed.

(d) In the event of the permanent incapacity of such person to operate a motor vehicle if such person surrenders for cancellation his operator's or chauffeur's license and, if suspended under the provisions of Section 410 of this code, the registration cards and license plates issued for all motor vehicles registered in his name to the department.

(e) The department shall not release such proof: (1) if any action for damages upon a liability referred to in this code is then pending, or (2) if any judgment upon such liability is outstanding and unsatisfied.

(f) An affidavit of the applicant of the nonexistence of such facts shall be prima facie evidence thereof.

418. (a) The department shall cancel any bond or any certificate of insurance or direct the return of any money or securities to the person entitled thereto, upon the substitution and acceptance of other adequate proof of ability to respond in damages pursuant to this code.

(b) Whenever any evidence of (or) proof of ability to respond in damages filed by any person under the provisions of this code no longer fulfills the purpose for which required the department shall, for the purpose of this code, require other evidence of ability to respond in damages as required by this code, and shall suspend the privilege of such person to operate a motor vehicle upon a highway or the operator's or chauffeur's license issued to him evidencing such privilege. Such suspension shall also include the registration card and license plates issued for all motor vehicles registered in the name of such person; provided, the original suspension resulted from an unsatisfied judgment. Such suspension shall remain in effect until adequate proof of ability to respond in damages shall have been filed with the department by such person.

419. (a) The operator of every motor vehicle which is in any manner involved in an accident within this State, in which any person is killed or injured, or in which damage to the property of any one person, including himself, in excess of one hundred dollars ($100) is sustained, shall within 10 days after such accident report the matter in writing to the department. If such operator be physically incapable of

making such report, and is not the owner of the motor vehicle involved in such accident then the owner shall, as soon as he learns of the accident, report the matter in writing to the department. The operator or the owner shall make such other and additional reports relating to such accident as the department shall require.

(b) The department shall suspend the license or any nonresident's operating privilege of any person who wilfully fails, refuses, or neglects to make report of a traffic accident as herein required.

420. (a) The department shall, within 60 days after the receipt of a report of a motor vehicle accident within this State which has resulted in bodiiy injury or death or damage to the property of any one person in excess of one hundred dollars ($100), suspend the license of each operator of a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this State, unless such operator shall deposit security in a sum which shall be sufficient in the judgment of the department to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against such operator or owner. Notice of such suspension shall be sent by the department to such operator not less than 10 days prior to the effective date of such suspension and shall state the amount required as security.

(b) Subdivision (a) shall not apply under the conditions stated in Section 420.1 or to any of the following:

(1) To such operator if the owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the department, covered by any other form of liability insurance policy or bond; or

(4) To any person qualifying as a self-insurer under Section 420.7.

(c) No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do busines in this State, except that if such motor vehicle was not registered in this State, or was a motor vehicle which was registered elsewhere than in this State at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance company or surety company, if not authorized to do business in this State, shall execute a power of attorney authorizing the director to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; provided, however,

every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than five thousand dollars ($5,000) because of bodily injury to or death of one person in any one accident and subject to said limit for one person, to a limit of not less than ten thousand dollars ($10,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than one thousand dollars ($1,000) because of injury to or destruction of property of others in any one accident.

(d) Upon receipt of notice of such accident, the insurance company or surety company which issued such policy or bond shall furnish for filing with the department a written notice that such policy or bond was in effect at the time of such accident.

420.1 The requirements as to security and suspension in Section 420 shall not apply.

(a) To the operator of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of any one other than such operator or owner.

(b) To the operator of a motor vehicle if at the time of the accident the vehicle was stopped, standing, or parked, whether attended or unattended, except that the requirements of this act shall apply in the event the department determines that any such stopping, standing, or parking of the vehicle was illegal or that the vehicle was not equipped with lighted lamps or illuminating devices when and as required

by the laws of this State and that any such violation contributed to the accident.

(c) If, prior to the date that the department would otherwise suspend the license or nonresident's operating privilege under Section 420, there shall be filed with the department evidence satisfactory to it that the person who would otherwise have to file security has been released from liability or been finally adjudicated not to be liable or has executed a confession of judgment, payable when and in such installments as the parties have agreed to, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments, with respect to all claims for injuries or damages resulting from the accident.

420.2. The license and nonresident's operating privilege suspended as provided in Section 420 shall remain so suspended and shall not be renewed nor shall any such license be issued to such person until:

(a) Such person shall deposit or there shall be deposited on his behalf the security required under Section 420; or

(b) One year shall have elapsed following the date of such accident and evidence satisfactory to the department has been filed with it that during such period no action for damages arising out of such accident has been instituted; or

(c) Evidence satisfactory to the department has been filed with it of a release from liability, or a final adjudication of nonliability, or a confession of judg-

ment, or a duly acknowledged written agreement, in accordance with subdivision (c) of Section 420.1; provided, however, in the event there shall be any default in the payment of any installment under any confession of judgment, then, upon notice of such default the department shall forthwith suspend the license or nonresident's operating privilege of such person defaulting, which shall not be restored unless and until the entire amount provided for in said confession of judgment has been paid; and provided, further, that in the event there shall be any default in the payment of any installment under any duly acknowledged written agreement, then, upon notice of such default, the department shall forthwith suspend the license or nonresident's operating privilege of such person defaulting, which shall not be restored unless and until (1) such person deposits and thereafter maintains security as required under Section 420 in such amount as the department may then determine, or (2) one year shall have elapsed following the date when such security was required and during such period no action upon such agreement has been instituted in a court in this State.

420.3. In case the operator of a motor vehicle involved in an accident within this State has no valid California license he shall not be allowed a license until he has complied with the requirements of this chapter to the same extent that would be necessary if, at the time of the accident, he had held a license.

420.4. (a) The security required under this chapter shall be in such form and in such amount as the de-

partment may require but in no case in excess of the limits specified in Section 420(c) in reference to the acceptable limits of a policy or bond. The person depositing security shall specify in writing the person or persons on whose behalf the deposit is made and, at any time while such deposit is in custody of the department or other proper state officer, the person depositing it may, in writing, amend the specification of the person or persons on whose behalf the deposit is made to include an additional person or persons; provided, however, that a single deposit of security shall be applicable only on behalf of persons required to furnish security because of the same accident.

(b) The department may reduce the amount of security ordered in any case within six months after the date of the accident if, in its judgment, the amount ordered is excessive. In case the security originally ordered has been deposited, the excess deposited over the reduced amount ordered shall be returned to the depositor or his personal representative forthwith, notwithstanding the provisions of Section 420.5.

420.5. Where security deposited in compliance with the requirements of this chapter is in the form of cash, it shall be deposited by the department in a special deposit account with the State Controller for the purposes of this section. Security in any other form shall be placed in the custody of the State Treasurer. Such security, whether deposited with the State Controller or the State Treasurer, shall be applicable to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was

made, for damages arising out of the accident in question in an action at law, begun not later than one year after the date of such accident, or within one year after the date of deposit of any security under subdivision (c) of Section 420.2. Such security shall also be available for the settlement of any claims arising out of the accident in question or agreed upon in writing by the person or persons depositing such security. Such security on deposit or any balance thereof shall be returned to the depositor or his personal representative when evidence satisfactory to the department has been filed with it that there has been a release from liability, or a final adjudication of a nonliability, or a confession of judgment, or a duly acknowledged agreement, in accordance with subdivision (c) of Section 420.1, or whenever, after the expiration of one year from the date of the accident, or within one year after the date of deposit of any security under subdivision (c) or Section 420.2, the department shall be given reasonable evidence that there is no such action pending and no judgment rendered in such action left unpaid.

420.6. The foregoing provisions of this chapter shall not apply with respect to operation of any motor vehicle owned by the United States, this State, or any political subdivision of this State, or municipality thereof; nor, except for Section 419, to any person qualifying as a self-insurer under Section 420.7.

This chapter shall not apply with respect to operation of any vehicle owned or operated by a carrier subject to the jurisdiction of the Public Utilities Com-

mission of the State of California or the Interstate Commerce Commission.

420.7. (a) Any person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the department as provided in subsection (b) of this section.

(b) The department may, in its discretion, upon the application of such a person, issue a certificate of self-insurance when it is satisfied that such person is possessed and will continue to be possessed of ability to pay judgments obtained against such person.

(c) Any person duly qualified under the laws or ordinances of any city, city and county or county in this State to act as self-insurer and then acting as such, shall upon filing with the department satisfactory evidence thereof, be entitled to receive a certificate of self-insurance.

(d) Upon not less than five days' notice and a hearing pursuant to such notice, the department may upon reasonable grounds cancel a certificate of self-insurance. Failure to pay any judgment within 30 days after such judgment shall constitute a reasonable ground for the cancellation of a certificate of self-insurance.

420.8. Neither the report required by Section 419, the action taken by the department pursuant to this chapter, the findings, if any, of the department upon which action is based, nor the security filed as provided in this chapter shall be referred to in any way,

or be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages.

420.9. The director is hereby authorized to adopt and enforce such regulations as may be necessary for the administration of this chapter.

(b) Sections of general laws:

City Carriers' Act (Deering's General Laws of California, No. 5134).

Sec. 4. The Railroad Commission shall, in granting permits under the provisions of this act, require the carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 5 hereof, against liability imposed by law upon such carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one or more than one claimant. (Cal. Stats. 1935, ch. 312, p. 1057.)

Sec. 5. The protection required under section 4 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 4 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another, from time to time, with the consent of the Railroad Commission. (Cal. Stats. 1935, ch. 312, p. 1057.)

Sec. 6. The protection against liability as outlined in section 4 hereof must be continued in effect during the line of the permit, and the policy of insurance, surety bond or personal bond shall not be cancellable on less than ten (10) days' written notice to the Railroad Commission. The Railroad Commission shall have the power to establish such rules and regulations as may be necessary to carry out the provisions of sections 4 to 5, inclusive. (Cal. Stats. 1935, ch. 312, p. 1057.)

(Deering's General Laws of California, No. 5129a.)

Sec. 5. The Railroad Commission shall, in granting permits under the provisions of this act, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant. (Cal. Stats. 1935, ch. 312, p. 878.)

Sec. 6. The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance; issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof;

or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any of or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another from time to time, with the consent of the Railroad Commission. With the consent of the Railroad Commission a copy of an insurance policy, duly certified by the company issuing it to be a true copy of the original policy, or a photostatic copy thereof, or an abstract of the provisions of said policy, or a certificate of insurance issued by the company issuing such policy, may be filed with the Railroad Commission in lieu of the original or a duplicate or counterpart of said policy. (Cal. Stats. 1935, ch. 312, p. 878, as Am. Cal. Stats. 1937, ch. 722, p. 2008.)

Sec. 7. The protection against liability as outlined in section 5 hereof must be continued in effect during the active life of the permit, and the policy of insurance, surety bond or personal bond shall be not cancellable on less than ten (10) days' written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of sections 5 to 7, inclusive. (Cal. Stats. 1935, ch. 312, p. 878, Am. Cal. Stats. 1937, ch. 722, p. 2009.)

Appendix B

NOTICE AND RULING OF CALIFORNIA INSURANCE COMMISSIONER RE SURCHARGES ON PREMIUM ON ASSIGNED RISKS.

To: ALL INSURERS ADMITTED TO TRANSACT LIABILITY INSURANCE AND ALL INTERESTED PERSONS

RE: NOTICE OF PUBLIC HEARINGS ON PROPOSED AMENDMENTS TO RULES AND REGULATIONS

Notice is hereby given that Public Hearings will be held by the Insurance Commissioner at his office at 1182 Market Street, San Francisco, California at 10:00 A.M. on Monday, December 18, 1950 and at his office at 621 South Hope Street, Los Angeles, California at 10:00 A.M. on Thursday, December 21, 1950, to determine, pursuant to Section 11620 of the Insurance Code of the State of California (as amended by statutes of 1947, Chapter 1287) whether proposed amendments to the California Automobile Assigned Risk Plan, a part of the Rules and Regulations of the Insurance Commissioner, contained in Article 8, subchapter 3, Chapter 5, Title 10 of the California Administrative Code, are in keeping with the intent and purpose of said Section 11620.

The Governing Committee of the California Automobile Assigned Risk Plan has petitioned the Insurance Commissioner for a certain amendment to the California Automobile Assigned Risk Plan in which it is proposed to amend Section 2460 thereof to provide as follows:

"Section 2460. Each risk assigned under this Plan shall be subject to the rules, rates, minimum premiums, rating plans and classifications which the insurer to which such assignment is made normally applies in this state to risks not subject to the Plan, but such insurer may make a uniform additional charge of 10% for long-haul trucking risks and 15% for others if the applicant or anyone who normally or usually drives the motor vehicle

(a) is required to file proof of ability to respond to damages as provided by the Vehicle Code, or,

(b) during the 36 months immediately preceding the date of application for assignment, and, in case of renewal, during the 36 months immediately preceding the effective date of the renewal policy, has been convicted of any offense listed in Sections 2431 or 2431.1 of the Plan."

At such Hearings any interested person or his authorized representative, or both, will be afforded the opportunity to present, orally or in writing, statements, arguments or contentions.

Dated, November 28, 1950.

Wallace K. Downey,
Insurance Commissioner

STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE

Ruling No. 61.

TO ALL INSURERS ADMITTED TO TRANSACT LIABILITY INSURANCE:

SUBJECT: AMENDMENTS TO THE RULES AND REGULATIONS OF THE INSURANCE COMMISSIONER RELATING TO THE CALIFORNIA AUTOMOBILE ASSIGNED RISK PLAN.

Effective April 15, 1951, the Rules and Regulations of the Insurance Commissioner relating to the California Automobile Assigned Risk Plan contained in Article 8, subchapter 3, Chapter 5, Title 10 of the California Administrative Code, are hereby amended as follows:

Section 2460 is hereby amended to provide as follows:

"2460. Each risk assigned under this Plan shall be subject to the rules, rates, minimum premiums, rating plans and classifications which the insurer to which such assignment is made normally applies in this State to risks not subject to the Plan, but such insurer may make a uniform additional charge of 10% for long-haul trucking risks and 15% for others if the applicant or anyone who normally or usually drives the motor vehicle

(a) is required to file proof of ability to respond in damages as provided by the Vehicle Code; or

(b) during the 36 months immediately preceding the date of application for assignment, and, in the case of renewal, during the 36 months immediately preceding the effective date of the renewal policy, has been convicted of any offense listed in Sections 2431 or 2431.1 of the Plan."

John R. Maloney
Insurance Commissioner

San Francisco, California
January 5, 1951

Appendix C

CALIFORNIA INSURANCE CODE SECTIONS LIMITING PERSONAL LIABILITY OF MEMBERS OF RECIPROCAL OR INTERINSURANCE EXCHANGES IN CALIFORNIA.

1398. The power of attorney of an exchange subject to this article may limit the contingent liability of the subscriber for assessment, but such contingent liability shall not be less than an amount equal to and in addition to the amount of the premium deposit provided in the policy.

1401. If an exchange subject to this article has a surplus of admitted assets over all liabilities in a sum equal to one and one-half times the minimum paid-in capital required of incorporated insurers issuing policies on a reserve basis and doing the same classes of insurance, then the Insurance Commissioner, upon written request, shall issue his certificate stating such fact. Subscribers at an exchange so certified shall have no liability for assessment on policies issued while such certificate remains in effect. Whenever the Commissioner finds such fact does not exist, he shall revoke and require the surrender of his certificate. Upon revocation of such certificate no policy shall thereafter be issued nor be permitted to remain in force beyond the date fixed for the next payment of premium without written indorsement thereon providing for assessment liability in accordance with the terms of this chapter.

Appendix D

CALIFORNIA INSURANCE CODE SECTIONS PROVIDING FOR "THIRD PARTY ACTION" AGAINST LIABILITY INSURANCE CARRIER.

11580. A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this State unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein.

(a) Unless it contains such provisions, the following policies of insurance shall not be thus issued or delivered:

(1) Against loss or damage resulting from liability for injuries suffered by another person other than a policy of workmen's compensation insurance.

(2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable.

(b) Such policy shall not be thus issued or delivered to any person in this State unless it contains all the following provisions:

(1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy.

(2) A provision that whenever judgment is secured against the insured in an action brought by the

injured person, or by his heirs or personal representatives in case death results from the accident, then an action may be brought against the insurer, on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment.

11581. Upon any proceeding supplementary to execution, such judgment debtor may be required to exhibit any policy carried by him, insuring him against the liability for the loss or damage for which judgment was obtained.